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OVERVIEW OF FALSE CLAIMS AND FRAUD LEGISLATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

LEGISLATION TO COMBAT THE GROWTH OF FRAUD AGAINST THE FEDERAL GOVERNMENT THROUGH THE FILING OF FALSE CLAIMS BY GOVERNMENT CONTRACTORS

JUNE 17, 1986

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OVERVIEW OF FALSE CLAIMS AND FRAUD LEGISLATION

TUESDAY, JUNE 17, 1986

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 11:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Hatch, Grassley, and Specter.

Staff present: Randy Rader, counsel; Abigail Kuzma, counsel; and Mike Regan, counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

The Senate Judiciary Committee today considers legislation to combat the growth of fraud against the Federal Government through the filing of false claims by Government contractors. The Congress has held numerous hearings, has thoroughly examined this troublesome problem, and has concluded that remedial legislation is necessary. I am disturbed by the seemingly constant news reports of allegations of excessive profits taken by contractors under contracts with the Federal Government.

Nonetheless, I believe that remedial legislation must be fair and mindful of the constitutional protections that all in this country enjoy. To that end, I sincerely hope that the Congress will carefully examine all false claims legislation to ensure that these protections are preserved.

Some have raised questions about whether fraud and misrepresentation, which are based in common law, should be adjudicated before agencies without benefit of a jury trial. Additionally, concern has been expressed about the use of negligence as a liability standard and the preponderance of the evidence as the burden of proof in these fraud cases.

We have a distinguished list of witnesses appearing before this committee today, and I look forward to receiving their testimony, as we work toward a fuller understanding of the fraud problem and the development of the best solution.

Now, we are marking up a defense bill, the annual defense bill in the Armed Services Committee and I am going to have to turn this hearing over to Senator Hatch in a few minutes. I will take pleasure of reading the statements later, because this is a very important matter.

The first witness today I believe is Mr. Richard Willard, Assistant Attorney General. Mr. Willard, can you take about 5 minutes and put the rest of your statement in the record? We have a lot of witnesses here.

You may proceed.

STATEMENT OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. WILLARD. Thank you, Mr. Chairman.

It is a pleasure to be here today to testify with regard to the two antifraud bills which the administration has recommended and which have been introduced by Senator Cohen as the Program Fraud Civil Remedies Act, and by Senator Grassley as the False Claims Act Amendments. We appreciate the strong bipartisan interest that has been shown for the legislation, and the leadership which Senators Cohen and Grassley have shown in introducing them. I am particularly interested in discussing with members of the committee, including Senator Hatch, questions which have come up with regard to this legislation.

We think the antifraud bills are a good package generally. We are very supportive of the bills and we know members of this committee are very interested in having an effective civil fraud remedy available to the Government. Yet at the same time we want to answer questions that may have come up with regard to these packages.

Many of the questions have come up with regard to the administrative civil fraud remedy that is contained in Senator Cohen's bill. Fortunately, we have a model we can look to in this area, and that is the civil money penalty law under which the Department of Health and Human Services has been operating for several years now, recovering over $21 million of money which had been defrauded from the Government in the Medicare and Medicaid Programs. Inspector General Kusserow is here today to testify about how that program is operated and we think that their successful experience provides a model which Congress can use to extend for use in remedying civil fraud against the Government.

The administrative procedures contained in this act are procedures which we believe fully protect the due process rights of individuals and companies that are subject to these administrative proceedings. These are modeled on the Administrative Procedure Act and provide the same kind of due process protections that have been repeatedly upheld by the courts in administrative-type proceedings.

In particular, there is the protection of judicial review by the article III courts, which is a standard feature of the administrative law and which we think will further ensure that proceedings under this administrative remedy are conducted fairly with due regard for the procedural right of anyone who is subject to these proceedings.

We do not believe, in light of the *Atlas Roofing* decision by the Supreme Court, that this kind of administrative proceeding violates anyone's seventh amendment right to trial by jury under our Constitution. The Supreme Court held in *Atlas Roofing* that Congress had the power to create new kinds of statutory rights and remedies and that those would not be subject to the common law right to trial by jury as it existed at the time the seventh amendment was adopted. We believe that same reasoning would apply equally to this kind of proceeding for a civil remedy following administrative procedures.

One of the issues that has come up, Mr. Chairman, is the standard of intent with regard to enforcement of this act. Our proposal in Senator Cohen's bill as paralleled in Senator Grassley's proposed amendments to the False Claims Act, is to clarify what we think is the better view of the existing law as to the appropriate standard of intent.

The courts have been divided on what is and should be the standard of intent which the Government must show to prove a violation of the False Claims Act. What we hope to do is to eliminate some of this confusion by having legislation clarify the level of intent; and in this regard we are trying to steer a middle course between two extremes.

On the one hand, we do not think that mere negligence should provide a basis for a civil fraud remedy. I do not think anyone believes that. On the other hand, we do not think that we should have to prove a criminal standard of specific intent to defraud the Government. That is the kind of standard which is associated with criminal penalties, rather than civil penalties, and we think would be difficult to prove in many cases.

We have tried to recommend an intermediate course, a standard that would require knowledge of the false claim and would provide that there is some duty on the part of the contractor to ascertain when they make a claim against the Government that there is a reasonable basis for it. But this standard would not impose liability for an innocent mistake or mere negligence.

I think that the legislative history can clarify this intent and ensure that these remedies are not used to penalize honest mistakes. We certainly hope the legislative history will clearly reflect that that would not be the intent of Congress in enacting either of these laws.

There is one other aspect of the bill I would like to comment on, and that is the issue of the investigative subpoena for inspectors general. The administration has opposed the inclusion of a testimonial subpoena power on the ground that this is not normal for investigative agencies. The FBI does not have testimonial subpoena power and, therefore, we do not think it should be included for the inspectors general.

If it is included, though, we are satisfied that giving the Attorney General power to control the use of it would at least prevent it from being subject to any abuse.

In conclusion, I think that the legislation that the committee is considering, both the Cohen and Grassley bills would be very productive contributions to our efforts to pursue civil fraud litigation on behalf of the Government. Moreover, the bills would help to clarify many of the legal issues that have diverted the enforcement effort in recent years as the courts have come up with differing interpretations of the existing law.

In particular, the administrative remedy would allow many cases to be brought that otherwise would be too small to be profitably pursued in Federal courts. For that reason we strongly support both bills and hope that the Senate will give them favorable consideration.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Willard follows:]

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

It is a pleasure to be here today to discuss the Administration's anti-fraud legislation. As you know, Mr.Chairman, the two bills which are the heart of our legislative initiative -- Senator Cohen's Program Fraud Civil Remedies Act and Senator Grassley's False Claims Act Amendments--are similar to the administration's bills, which were announced by the Attorney General at a press conference last September and transmitted to the Congress as part of the President's Management Improvement Legislative Program of last summer. They are a major part of our continuing war on economic crime and I an happy to see that they have received bipartisan support in the Congress.

In prior appearance before this Committee, the Governmental Affairs Committee and the House Judiciary Committee, the Department has presented extensive testimony on this relatively complex legislation. Rather than reiterate our elaborate comments on this legislation, I would like to take this opportunity to discuss briefly some of the more critical issues raised by the two bills -- particularly the Program Fraud legislation, with which this Committee is perhaps less familiar.

The Program Fraud Civil Remedies Act, S.1134, is the product of a lengthy and very careful legislative development in the Governmental Affairs Committee. I note that previous versions of the bill date back to the 97th Congress, which were, in turn, based on draft legislation prepared by the Justice Department.

Justice Department officials, representatives of the Inspectors General, and the private bar have all been consulted and had input into the final product, which was reported by the Governmental Affairs Committee last November. It is, in our view, a very good bill.

We believe that a mechanism for resolution of many fraud matters through administrative proceedings is long overdue. Many of the government's false claims and false statement cases involve relatively small amounts of money compared to matters normally subject to litigation. In these cases, recourse in the federal courts may be economically unfeasible because both the actual dollar loss to the government and the potential recovery in a civil suit may be exceeded by the government's cost of litigation. Moreover, the large volume of such small fraud cases which could be brought would impose an unnecessary burden on the dockets of the federal courts.

Fortunately, legislative efforts in this area can be guided by the experience of the Department of Health and Human Services under the Civil Money Penalty Law, 42 U.S.C. 1320a-7a, a similar administrative money penalty statute which has been in effect for several years. Under that law, HHS has recovered over $21 million under the Medicare and Medicaid programs. Inspector General Kusserow and the entire Department are to be commended for their efforts. HHS's successful experience testifies to the great savings which could be achieved if this authority were extended government-wide.

The administrative proceedings outlined in section 803 of S. 1134 preserve full due process rights, including the rights to notice, cross examination, representation by counsel and determination by an impartial hearing officer, and thus will withstand constitutional challenge. The use of a hearing examiner, or Administrative Law Judge, to compile a factual record and make an initial determination is a common, legally unobjectionable method to administer federal programs. Critics of the use of hearing examiners can point to no legal precedent questioning this administrative hearing mechanism, and, in fact, it has been upheld consistently against court challenge. See, Butz v. Economou, 438 U.S. 478, 513-4 (1978); NLRB v. Permanent Label Corp., 687 F.2d 512, 527, (Aldisert, C.J., concurring).

Criticism of the hearing examiner's supposed lack of independence ignores these well established precedents as well as several protections built into S. 1134. While the hearing examiner would be an employee of the agency, section 803(f)(2)(C) of the bill assures the hearing examiner an appropriate level of independence by providing that he shall not be subject to the supervision of the investigating or reviewing official, and could not have secret communications with such officials. The bill thus incorporates the generally accepted protections required by the Administrative Procedure Act. And, of course, any adjudication of liability under this bill would be subject to independent review in the Court of Appeals by an Article III judge.

In light of the Supreme Court's holding in Atlas Roofing Co. v. Occupational Safety and Health Administration, 430 U.S. 442 (1977), we do not believe that these proceedings would violate the Seventh Amendment's guarantee of trial by jury. In Atlas Roofing, the Court rejected a Seventh Amendment challenge to the administrative penalty provisions of the Occupational Safety and Health Act of 1970 because it concluded that Congress had created new rights which did not exist at common law when the Amendment was adopted. The Court held that:

> when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction

> that jury trial is to be "preserved" in "suits at common law".

430 U.S. at 455. The rights created here are not co-extensive with any common law cause of action known when the Seventh Amendment was adopted. In addition, we believe that this statute may, like the False Claims Act, be characterized as a "remedial" statute imposing a "civil sanction". See United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). Given these considerations, the administrative proceedings do not deny unconstitutionally trial by jury.

Perhaps the most significant issue in the debate over S. 1134 is one which goes to the heart of the civil enforcement provisions of the Act: the standard of knowledge required for a violation of the Act. As a civil remedy designed to make the government whole for losses it has suffered, the False Claims Act currently provides that the government need only prove that the defendant knowingly submitted a false claim. However, this standard has been misconstrued by some courts to require that the government prove that the defendant had actual knowledge of the fraud, and even to establish that the defendant had specific intent to submit the false claim. Eg., United States v. Mead, 326 F.2d 118 (9th Cir. 1970). This standard is inappropriate in a civil remedy, and S. 1134 -- as well as S.1562, the bill reported from this Committee -- would clarify the law to remove this ambiguity.

The standard contained in the bills would punish defendants who knowingly submit false claims. The bills define the key term "knowingly" to punish a defendant who:

(A) has actual knowledge that the claim or statement is false, fictitious or fraudulent or;

(B) acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement;

S. 1134, §801(a)(b). Essentially the same formulation, with slight wording changes, is included in S. 1562, new section 3729(c).

This standard achieves two goals. First, it makes clear that something more than mere negligence is required for a finding of liability. Second, it reaffirms the widely shared belief that anyone submitting a claim to the government has a duty -- which will vary depending on the nature of the claim and the sophistication of the applicant -- to make such reasonable and prudent inquiry as is necessary to be reasonably certain that he is, in fact, entitled to the money sought. This concept of an inherent duty to make reasonable inquiry before submitting a claim to the government is reflected in the better reasoned caselaw. See, eg., United States v. Cooperative Grain Supply Co., 472 F.2d 47 (8th Cir. 1973). A more detailed explanation of the Department's endorsement of this standard is set forth in the attached December 11, 1985 letter to Senator Charles McC. Mathias.

We believe that this standard reflects well-developed scienter concepts which would fully protect honest individuals in their dealings with the government. The False Claims Act has been in place since 1863, and we are unaware of any case under the Act in which a contractor or other recipient of government funds has been punished for an honest dispute with the government. In particular, we would strongly oppose any effort to engraft upon the existing scienter standard another requirement that a knowingly false claim must be accompanied by an intent to defraud. In our experience, intent requirements in the civil area lead to confusion and impose an overly stringent burden upon the government. The False Claims Act is not generally interpreted to require a showing of intent, see, eg., Cooperative Grain & Supply Co., and we do not believe that such an intent requirement should be imposed here.

Questions have also been raised as to the effect which a finding of liability under this Act would have on a subsequent administrative proceeding to suspend or debar a contractor. Some have suggested an amendment to prevent the use of a civil penalty judgment in debarment or suspension proceedings. However, in our view, amending the bill to deny any evidentiary value to a civil penalty judgment in any administrative, civil or criminal proceeding is wholly inappropriate. The civil penalty proceedings envisioned by the bill will afford a full measure of due process protections, as well as the opportunity for judicial review of the proceedings. In view of this consideration, we believe that there is no justification for disturbing the normal rules of _res judicata_ and collateral estoppel, and requiring another tribunal to go through the costly exercise of retrying the same facts that have already been established under the same standard of proof in a civil penalty proceeding.

In addition, it is important to note that a contractor would always be free to argue the question of remedy in a suspension or debarment proceeding. According _res judicata_ or collateral estoppel effect to the facts underlying a civil penalty judgment in a later suspension or debarment proceeding would not necessarily establish that suspension or debarment was the appropriate remedy. A contractor would still have the opportunity to argue that he should not be suspended or debarred and that some lesser sanction -- or no sanction at all -- should be imposed.

In one respect, however, S. 1134 could still be improved. The Department continues to have strong objections to section 804(a)(2), which permits Inspectors General and other investigatory officials to use compulsory process to obtain testimonial evidence as part of an investigation. Under the existing provisions of the Inspector General Act of 1978, Inspectors General are authorized to compel production of documentary evidence. Neither the Inspectors General, nor the Federal Bureau of Investigation -- the government's principal law enforcement investigatory agency -- currently issue investigative subpoenas to compel testimony. The potential for the unlimited exercise of testimonial subpoena powers during investigations might raise due process issues as well as interfere with the criminal investigation process. In addition, although the Attorney General is granted 45 days to review and veto any such subpoena, this short period would prove inadequate to ensure consistency of standards and implementation. Given the proliferation of ongoing grand jury investigations targeted at fraud, there would be a serious potential for conflict with testimonial subpoenas issued by the IG's. In this manner, section 804(a)(2) could adversely affect coordinated law enforcement. Consequently, the Administration strongly urges the Congress to delete section 804(a)(2).

Finally, let me speak briefly to S.1562, Senator Grassley's False Claims Act Amendments. This bill, ordered reported from the Judiciary Committee in December, incorporates nearly all of the Administration's proposed amendments. It would modernize the Act, clarify the standard of knowledge and the burden of proof (which are subject to conflicting circuit court interpretations), and give the Civil Division the authority to issue Civil Investigative Demands (CID), a much needed investigative tool. Our previous statement fully explains the justification for each of the changes included in the bill. However, there is one point relating to the CID authority which I would like to stress. I think it is important that the Justice Department be able to share information which it acquires through a CID with other agencies for use in exercising their statutory responsibilities. Evidence of fraud on the government could implicate a host of other statutory concerns unrelated to the public purse. For instance, substandard goods provided to the government might also be in violation of health and safety regulations enforced by other federal agencies. As long as there are appropriate safeguards to prevent indiscriminate dissemination -- such as the requirement in S. 1562 that Justice obtain a court order authorizing sharing with another agency -- we believe that sharing CID information is in the public interest.

Perhaps the most complex issue raised during Committee consideration of the False Claims Act amendments was the proposed amendments to the "qui tam," or citizen suit, provisions of the Act. Because of the demonstrated, consistent misuse of the current qui tam statute to bring frivolous, politically-motivated lawsuits, the Justice Department has strong reservations about any effort to further liberalize this provision. Nevertheless, we recognize that many Members of Congress believe that changes in the statute are needed to encourage the efforts of "whistleblowers" who may have inside knowledge about fraud in the government. In an effort to advance this legislation, we entered into discussions with the proponents of the qui tam changes, and ultimately reached a reasonable compromise which is embodied in S. 1562 as ordered reported from the Committee. While we continue to have some reservations about these changes, we believe that the compromise contains adequate protections against misuse and frivolous litigation. We do not believe that concerns about S. 1562's relatively marginal changes in the qui tam statute should stand in the way of prompt passage of the bill.

That concludes my prepared statement and I would be happy to answer questions about the Administration's two bills.

The CHAIRMAN. Thank you very much.

I overlooked calling on the able chairman of the Subcommittee on the Constitution to see if he had a statement.

Senator HATCH. I will just put my statement in the record, Mr. Chairman.

The CHAIRMAN. We also have statements of Senators Grassley and McClure for the record.

[Prepared statements follow:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

The purpose of this hearing is to examine legislation within the 99th Congress responding to the problem of fraud and false claims and statements against the Federal Government. I want to thank Senators Cohen and Levin for their extensive work in this area and for their willingness to join the Judiciary Committee in examining this important issue. I also want to thank Senators Hawkins and McClure for their comments.

The seriousness of Government program fraud is well documented. A 1981 General Accounting Office report documented over 77,000 cases of fraud and other illegal activities reported in 21 agencies during a 3-year period. While the tremendous impact of such fraud during a three-year period. While the tremendous impact of such fraud is clear, particularly in light of efforts to trim the burgeoning Federal deficit, the establishment of a broad based administrative procedure to punish fraud and false claims has many important implications.

Legislation introduced within the 97th, 98th and 99th Congresses has proposed legal mechanisms and penalties to respond to this difficult problem. The procedural provisions of each of these bills have elicited objections, many of them constitutional in nature.

First, seventh amendment questions have been raised. The seventh amendment provided that "In suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This concern is relevant to legislative proposals that do not provide for a jury trial but instead establish an alternative mechanism in the form of an administrative procedure to pursue false claims. With seventh amendment concerns in mind we must examine the nature of the protections guaranteed by the seventh amendment. Given the "criminal-like" aspects of fraud and the stigma associated with a finding of liability for fraud, is an administrative procedure adequate under the seventh amendment?

Concerns involving the due process of the fifth amendment are equally important. The concept of due process of law under the fifth amendment embraces a broad range of procedural and substantive requirements intended to preserve "Those canons of decency and fairness which express the notions of justice of english-speaking peoples." This requirement of fundamental fairness involves basic rights of notice and a fair public hearing before an impartial tribunal, of discovery of the evidence and cross-examination of witnesses, judicial review of the action of administrative officers. With these concerns in mind, I look forward to hearing the testimony at today's hearing.

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman, the "False Claims Act" is the Government's primary weapon against fraud, yet is in need of substantial reform. A review of the current environment is sufficient proof that the Government needs help—lots of help—to adequately protect the Treasury against growing and increasingly sophisticated fraud.

I appreciate the opportunity to participate in this hearing on Government fraud remedies. We have spent a considerable amount of time in the Subcommittee on Administrative Practice and Procedure examining different types of frauds which steal away much needed taxpayer funds. In the face of our current Federal debt crisis, it is more important than ever that we maintain an efficient, fair and most of all, effective enforcement system to protect our Federal dollars from fraud and abuse.

No single piece of legislation can absolutely guarantee an efficient, fair and effective enforcement system. We would be deluding ourselves to assume that security. However, to the extent we can strengthen weaknesses in the law which allow frauds to go undetected or unaddressed and fraudulently obtained funds uncollected—that is the type of legislative remedy we should enact without delay.

As the chairman knows, there are fraud reform measures supported by the administration which are pending now in the Senate. With congressional interest high and the President's solid support, this is an ideal opportunity for legislators, the grass roots public, and the Government contracting industry, to work together to enact meaningful reforms.

There is no question that the current state of affairs begs for reform. Fraud allegations are climbing at a steady rate while the Justice Department's own economic crime council last year termed the level of enforcement in defense procurement fraud "inadequate."

No one knows, of course, exactly how much public money is lost to fraud. Estimates range from hundreds of millions of dollars to more than $50 billion per year. Sadly, only a fraction of the fraud is reported and an even smaller fraction of the funds recovered.

Part of the solution is to develop a way for frauds of lesser significance or lesser dollar amounts to be remedied. Too many minor fraud cases slip through the cracks or simply are refused by the Justice Department due to a judgment that pursuance of the cases would not be cost effective.

I strongly support and am a cosponsor of S. 1134 introduced by Senator Cohen and reported favorably by the Governmental Affairs Committee. The "Program Fraud and Civil Penalties Act" expands, Government wide, an administrative system for addressing small dollar fraud—a system that has produced impressive results at the Department of Health and Human Services.

Another part of the solution—something I consider essential to any meningful improvements in cutting down fraud—is the establishment of a solid partnership between public law enforcers and private taxpayers. The Federal Government has a big job on its hands as it attempts to ensure the integrity of the nearly $1 trillion we spend each year on various programs and procurement. That job is simply too big if Government officials are working alone.

The concept of private citizen assistance is embodied in S. 1562, the False Claims Reform Act which was reported favorably by the Senate Judiciary Committee last December. This bill, which I sponsored along with bipartisan cosponsors including my colleagues on this committee, Senators DeConcini, Hatch, Metzenbaum, Leahy and Specter, is supported also by the administration and its amendments have received endorsements from both the Packard Commission and the Grace Commission's committee against Government waste.

I look forward to hearing from today's witnesses. As we listen to their testimony I think we should keep in mind that fraud flourishes where incentives encourage it. If our interest is in saving taxpayer dollars through decreasing fraud, our emphasis should be on ensuring that cheating the Government does not pay.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR JAMES A. MCCLURE

Mr. Chairman, I deeply value the opportunity to commend this Committee, its Chairman and the distinguished Senator from Utah, Senator Hatch, for holding these hearings and for agreeing to study the constitutionality and other aspects of the various false statement or false claims bills which may come before the Senate in this session.

As the distinguished acting Chairman is aware, on March 14, 1986, I asked Senator Thurmond to arrange for this hearing and study because of my own uncertainty concerning the constitutionality of certain salient aspects of the proposed laws.

In a general sense, my chief reservation is that both S. 1134 and S. 1562 would permit the imposition of very large so-called "civil fines" on an individual but deny the citizen being penalized any recourse to a jury trial or even to a court trial without a jury.

Although I am aware that certain existing statutes permit the imposition of small civil penalties in cases involving false claims made against the government, I am also aware that those statutes are very limited in scope and have been deemed by the courts to be essentially compensatory to the government rather than punitive to the individual . The legislation now contemplated seems to me to be very much broader in scope and clearly intended to be more in the nature of a device for imposing criminal fines than for recovering civil damages.

Although I make no claim to be a constitutional scholar, my intuition as a lawyer and student of American History tells me that there is something fundamentally wrong about permitting a government bureaucrat to assess cumulative fines of $100,000 or more against an individual with no safeguard whatsoever of the fundamental right of each of us to be tried before a jury of our peers or at least to have our case heard in a duly constituted court as trier of fact.

This point brings me, Mr. Chairman, to another central difficulty that I believe the Committee should examine. The proposals under study all involve what has come to be called "court stripping." This term means depriving the Article III courts of statutory jurisdiction to hear certain types of cases and controversy through the authority of Congress to establish and thereafter to specify by statute the jurisdiction of the federal courts in those areas where jurisdiction is not specifically granted to the Supreme Court by the Constitution.

Most often we have heard the term "court stripping" used in connection with debates on prayer in school, right to life, busing, and similar controversies. In this case, that is of the false claim legislation, "court stripping" would be used to prevent trial court jurisdiction and authority and to allow only highly limited appeal to the Federal Courts of Appeals from arbitrary or capricious decisions. Obviously, if this procedure can be followed with respect to alleged false statements made to a government bureaucrat, then it can also be followed in the other areas I have mentioned.

This aspect of the legislation should therefore receive close scrutiny before this Committee because there will undoubtedly be Senators who will wish to use the "court stripping" provisions in these bills as a vehicle for reducing or prohibiting the jurisdiction of federal courts in other areas.

A final aspect of these proposals which I find anomolous is the overall lack of equity in the powers given the government and the powers given to a citizen subjected to the procedures specified. Although there are many horror stories concerning citizens and businesses taking unfair or illegal advantage of the government in a wide variety of government programs, there are also countless similar occasions in which the government or government bureaucrats have abused citizens and private businesses. No Senator can long serve in this body without having brought to his attention incredible examples of abuse of power by government officials resulting in significant economic or emotional harm to private individuals and small business.

Perhaps the Committee should consider whether there is not some way in which the legislation can be balanced so that a citizen or business damaged by a false claim or statement of a government official could not also collect a $10,000 "civil penalty" from the Treasury or from the official individually or from both.

Maybe you should consider an amendment to make the liabilities of the legislation clearly applicable to false statements, oral or written, made by any government official through which a citizen is damaged. Obviously, the amendment would not apply to statements made in constitutionally protected debate.

In conclusion I again thank this distinguished Committee and my good friend who is Chairing this hearing for the work you have undertaken. I recognize that the scope of your review is limited to constitutional and court-related implications and to claims against the United States.

I take this opportunity, however, to advise the Committee that, as a member of the Subcommittee on Defense Appropriations, I have asked the Department of Defense to provide a report on the practical effects of the enactment of S. 1134 and S. 1562 on the defense procurement process. In particular I have asked for a report on the actual number of statements covered by the legislation made daily to agencies operating under budget function 050. I suspect this number will be enormous and that guarding against liability under these proposals could so greatly increase the cost of doing business with the government that many small businesses will drop from competition and that procurement costs generally will increase.

I mention this report because I am sure members of the Committee will have an interest in it, even though it would not be strictly within the subject matter before you. I have already received some of the information I am seeking and will transmit it to the Committee after the facts have been fully developed.

Mr. Chairman, again thank you very much, and I look forward to the views and advice of the Committee based on the record developed here.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Yes, let me ask a couple of questions, Mr Willard. The Supreme Court, in *Atlas Roofing, Inc.* v. *Occupational Safety and Health Review Commission*, found that in cases involving new public rights created by statute, the seventh amendment does not prohibit Congress from assigning the factfinding function and the initial adjudication to an administrative forum. However, it seems to me we have to examine whether an action for fraud is distinct from procedures found suitable for administrative review. Findings of fraud carry a criminal-like stigma, whether we like it or not, and in fact may be prosecuted through a criminal procedure.

Now, do you see any distinction between a case involving the imposition of civil penalties for employers maintaining unsafe working conditions and a case alleging that an employer defrauded the Federal Government?

Mr. WILLARD. For purposes of the seventh amendment right to trial by jury, Senator Hatch, I do not see a distinction. I think that the allegation that an employer has maintained an unsafe, dangerous workplace also carries with it some kind of a stigma as well.

But we have repeatedly sought to characterize the False Claims Act remedies as being noncriminal and nonpunitive, but rather, remedial in nature. The Supreme Court has agreed with our characterization of these remedies as being remedial and not criminal in nature. That is why we do not think there should be a high burden of proof in these cases. Basically, they are designed to make the Government whole for its losses and not to impose punishment.

When we want to impose punishment, of course, we proceed criminally, as we do in many of these cases. We have no doubt that there should be a right to trial by jury for criminal fraud prosecution. But as to the civil remedy, it is designed to make the Government whole, and we think that under *Atlas Roofing* such a case can be appropriately handled by an administrative tribunal.

Senator HATCH. The Supreme Court in the *Atlas* case held that the seventh amendment does not prohibit Congress from creating new public rights and remedies by statute when it concludes that remedies available in the courts of law are inadequate to cope with any particular problem within Congress' power to regulate.

Now, given that the False Claims Act currently provides for the same remedy for fraud and false claims as that established in this bill, S. 1134, can we say that this action which provides for a jury trial is inadequate?

Mr. WILLARD. I am not sure I quite understand your question, Senator.

Senator HATCH. Well, are we merely replacing an adequate procedure within the False Claims Act with an unneeded administrative procedure? I think maybe that sums it up.

Mr. WILLARD. Senator, in our view, the False Claims Act is itself a statutory remedy which was unknown to the common law that existed at the time of the seventh amendment. So for that reason, what we are providing here is an alternative to what was a statutory remedy, rather than a common law remedy. It would be different if we tried to provide an administrative tribunal to handle an action which was known to the common law at the time the seventh amendment was adopted.

Senator HATCH. OK. I am concerned that this administrative procedure places the accused at a disadvantage when compared to the protections afforded him during a normal civil trial in this country.

For example, under this bill the accused has a right to discovery only to "the extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair and reasonable consideration of the issues." Under this expeditious hearing standard, the accused could be denied the right to obtain copies of transcripts taken pursuant to the testimonial subpoena of witnesses or to documents which are subpoenaed. If you could, would you explain the due process protections afforded the accused within this administrative procedure, and do they solve that concern of mine?

Mr. WILLARD. Well, Senator, let me start first by saying that there is obviously a difference in procedural rights of a trial by jury under the False Claims Act and the administrative proceeding here. That is, of course, part of the idea behind the bills; to provide a form of, if you will, alternative dispute resolutions to handle these smaller cases more efficiently and cheaply for all concerned. If you were to make the procedural rights in the administrative proceeding identical to those in the District Court proceeding, then you would be defeating the major purpose of this legislation, which is to provide a quicker, faster alternative dispute resolution mechanism for the smaller cases.

We do believe, though, that the level of procedural rights provided in the administrative proceeding are adequate. In fact, it is unusual to have any kind of discovery rights in administrative proceedings. The APA does not normally grant a right to any discovery. This act, as we understand it, would create limited discovery right and, while it is not as full as under the Federal Rules of Civil Procedure, it is actually more generous than is normally the case in administrative proceedings.

Senator HATCH. Let me just ask one other question, and that is under S. 1134, the agency's inspector general may compel personal appearance and testimony without even notifying the subject of the subpoena or the nature of the questioning itself or even the purpose for the investigation. So the person subpoenaed is not even given notice that he may be accused of any particular wrongdoing. Now, do you not think that this lacks a procedural due process protection?

Mr. WILLARD. Senator, first of all, as I mentioned in my opening statement, the administration did not initially propose giving testimonial subpoena power to inspectors general. We do not think it is really necessary. The FBI does not have a testimonial subpoena power as a general matter.

But if such a right is granted, we think that it can be exercised subject to the control of the Attorney General in a way that will allow it to operate fairly. I think that the question about what kind of notice to provide and so forth is better handled through administrative guidelines promulgated by the Attorney General, rather than to have the legislation try to lock in an unnecessary level of procedural detail. That is why I think that the question you have raised about the fair way to provide notice is one that ought to be considered, but we think would be better handled under guidelines from the Attorney General, rather than trying to write all of the detailed rules into the legislation. Although, once again, we would be happy to work with the committee if you want to try to do that.

Senator HATCH. I have other questions, but I think I will submit them in writing. I appreciate your responses.

[The prepared questions of Senator Hatch follow:]

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

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July 3, 1986

The Honorable Richard Willard
Assistant Attorney General
Civil Division
Department of Justice
10th and Constitution Ave., N.W.
Washington, D.C. 20201

Dear Richard:

As indicated in the Commiteee's hearing on June 17, 1986, concerning S. 1134, false claims and fraud legislation, I would appreciate your written responses to the attached question. Please return your answers to the Committee in 212 Senate Dirksen Office Building, Washington, D.C. 20510 not later than the close of business on July 15, 1986 . If your have any questions please contact Jean Leavitt at (202) 224-8191.

QUESTION: As you know, the courts today are split among three different views of the appropriate standard of knowledge or intent for fraud actions, varying from a "constructive knowledge" test, adopted only by the eighth circuit, to actual knowledge with specific intent to defraud the United States, a position held by the fifth and ninth circuits. The majority of circuits rejected both of these positions and have adopted the view that proof of actual knowledge is required but specific intent to defraud the United States is not. I have concerns that both S. 1134 and S. 1562, contain a very liberal gross negligence standard. The American Bar Association and others have recommended a definition of knowledge which includes actual knowledge, deliberate ingorance and reckless disregard for the truth. Can you respond to these concerns that a gross negligence standard for a fraud action is inappropriate ?

With kindest regards and best wishes,

Sincerely,

Orrin G. Hatch
Chairman
Subcommittee on the Constitution

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

29 JUL 1986

Senator Orrin Hatch
Chairman, Constitution Subcommittee
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letters of June 19 and July 3, 1986 to Assistant Attorney General Richard K. Willard transmitting questions for the record relating to S. 1134 and S. 1562, the two civil fraud bills pending before the Senate. For your convenience, the questions are repeated along with the answers.

Question 1: S. 1134 would create a new administrative mechanism in Title 5 for imposing civil penalties on persons who make false claims and statements to the United States. What remedies currently are available to the Government in such cases, and what would be the interrelationship of the new provisions and the existing remedies?

Response 1: Currently, the government's civil remedies in fraud cases are limited to those causes of action which we may assert in a suit in district court. In such suits, we allege violations of the False Claims Act, 31 U.S.C. 3729, as well as related common law causes of action, such as breach of contract and unjust enrichment.

The only existing administrative remedy for the submission of false claims to the government is that available to the Department of Health and Human Services under the Civil Money Penalty Law, 42 U.S.C. 1320a-7a. That statute is limited to cases of medicare and medicaid fraud.

The administrative remedy of suspension and debarment does not recoup the money which the government lost. Rather, it is an exercise of the government's business judgment, reflecting the decision to avoid contracting in the future with firms and individuals who have a record of committing fraud on the United States.

Enactment of S. 1134, the Program Fraud Civil Remedies Act, would give the government two remedies for the same fraudulent conduct: suit in district court under the False Claims Act or an administrative proceeding under S. 1134. The government would utilize only one of these remedies in each case of fraud--we would not bring a civil action to recover damages for the same fraud in two different forums. The Justice Department, in the course of its review of agency referrals under section 803, would decide which cases the agencies could bring administratively and which cases Justice Department attorneys would bring in district court.

Finally, the government currently has no civil remedy for the knowing submission of a false statement which does not relate to a claim for money. Our remedy is limited to criminal prosecution under 18 U.S.C. 1001, which, given resource constraints, may not be a realistic option in many cases. A simple civil remedy such as that provided under Section 802 (a)(2) of S. 1134 would be a valuable deterrent to many types of government program abuse.

Question 2: Will the administrative proceedings mandated by the proposed legislation be cost effective, in terms of the involvement of the Department of Justice?

Response 2: We believe that the new administrative proceedings authorized by S. 1134 will be a highly cost effective mechanism for prosecuting the smaller fraud cases which may not warrant litigation in the district courts. The Justice Department would of course have to review cases before authorizing an agency to bring suit, but this would only involve a small fraction of the time which we would spend in litigating a case. Hence, we believe that the proceedings would constitute a cost-effective mechanism for the resolution of the smaller fraud cases. Certainly, this has been the experience of the Department of Health and Human Services under its statute.

Finally, in your letter of July 3, 1986, you asked about the standard of knowledge in the two bills:

Question: As you know, the courts today are split among three different views of the appropriate standard of knowledge or intent for fraud actions, varying from a "constructive knowledge" test, adopted only by the eighth circuit, to actual knowledge with specific intent to defraud the United States, a position held by the fifth and ninth circuits. The majority of circuits rejected both of these positions and have adopted the view that proof of actual knowledge is required but specific intent to defraud the United States is not. I have concerns that both S. 1134 and S. 1562, contain a very liberal gross negligence standard. The American Bar Association and others have recommended a definition of knowledge which includes knowledge, deliberate ignorance and reckless disregard for the truth. Can you respond to these concerns that a gross negligence standard for a fraud action is inappropriate?

Response: As you know, it has always been the view of the Justice Department that Congress, in crafting a standard of knowledge, should be guided by a few basic principles. First, in a civil fraud case, the government should not have to prove specific intent to defraud, a requirement that, in our view, is only appropriate in criminal cases. On the other hand, the government should not be able to establish civil liability under the Act where the false claim is the result of honest mistake or simple negligence. The appropriate standard of scienter should, therefore, be somewhere between negligence and specific intent. These fundamental principles have, in our view, been shared by all of the participants in the debate on these two bills. The only issue has been how best to implement this shared consensus.

The two bills currently contain a variation of a gross negligence standard, defining "knows or has reason to know" as one who has actual knowledge of the fraud or who:

> acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement.

An alternate formulation, supported by the American Bar Association, would modify the definition to impose liability on one who "acts in reckless disregard of the truth or falsity of the claim or statement." In our view, there is little if any difference between "gross negligence" and "reckless disregard" as a standard of scienter. Certainly, the lengthy and elaborate legislative history reflecting the Congressional intent to establish a standard of scienter somewhere between intent and negligence is of considerably greater significance than this mere change in terminology.

In conclusion, we feel strongly that, in civil fraud prosecutions under the False Claims Act, or the analogous provisions of S. 1134, the government should not have to prove actual knowledge of the fraud in every case. Instead, where it is clear that the defendant deliberately insulated himself from knowledge of the fraud being committed, the government should be able to impute knowledge in order to establish liability. The question of whether knowledge may be imputed to a defendant will, inevitably, depend on the facts of each case. We believe that a reckless disregard standard, fully as much as a gross negligence standard, adequately sets forth ground rules to guide courts in making this determination.

The Office of Management and Budget advises us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John R. Bolton

John R. Bolton
Assistant Attorney General

The **Chairman**. The distinguished Senator from Iowa.

Senator **Grassley**. Mr. Willard, we have had some indication that people are confused on one aspect of the legislation bringing in the administrative remedy. There is a feeling that there could be double recoveries, one because of administrative remedy, the other because of judicial remedy. Do you see that that is possible?

Mr. **Willard**. I do not think it is possible at all, Senator, and I think the legislative history could certainly be clear to reflect that understanding. We have always felt, and the courts have always held that the Government is entitled to one remedy. That is the burden we have operated under in the past, where we might have multiple remedies under different statutory theories Usually we only got one recovery. In fact, I am not aware of any case where we have had duplicative recoveries awarded to Government.

Senator **Grassley**. OK. Well, as long as we are making legislative history, I want to make clear that it is not my intent in S. 1562 that there be double recovery.

On another point, and I would like to refer to the House Judiciary Committee's action on recently marking up H.R. 4827, and that also amends the False Claims Act, that bill as amended would allow the fraud actions to be delayed until the final resolution of claims filed under the Contract Disputes Act. I would like to know what you think the effect of that provision might be.

Mr. **Willard**. I think that provision would be a big step backward in the Government's ability to pursue civil fraud, because that would impose a new limitation on our ability to pursue civil fraud claims that is not now in existence. It would allow the subjects of civil fraud actions to delay the initiation of legal action against them by invoking the Contract Disputes Act mechanism.

Senator **Grassley**. It sounds like it would just about gut the bill.

Mr. **Willard**. Well, I think it would impose a severe detriment on the Government's ability to use the legislation and for that reason we are very concerned about that provision. Certainly, we would encourage the Senate not to do likewise.

Senator **Grassley**. OK. Now, my last point would be in regard to the number of fraud deferrals. I think 2,700 each year that your division receives, and yet the number of complaints filed is only around 35, and the number of settlements or judgments is right around 50. Are some of those many cases not brought, would those be cases that would involve smaller dollar amounts and the Department might find it not cost-effective to pursue them?

Mr. **Willard**. That is certainly true, Senator, and that is one of the major reasons we support the creation of an administrative remedy. Basically, our job is to try to get the most money for the taxpayers as we can under these programs and we have to focus our resources, which are of course limited, on the cases that we think will have the biggest dollar payoff. It is not possible for us to go after some of the smaller cases and that is why I think this administrative remedy would be very helpful.

Senator **Grassley**. So then that would cause a large share of those from slipping through the cracks?

Mr. **Willard**. That is correct, Senator.

Senator **Grassley**. Mr. Chairman, that is all the questioning I have of Mr. Willard.

The CHAIRMAN. Thank you very much.

Thank you, Mr. Willard, for your presence and your testimony.

Senator GRASSLEY. Mr. Chairman, I do have an opening statement that I want to give?

The CHAIRMAN. A what?

Senator GRASSLEY. An opening statement that I want to give.

The CHAIRMAN. Without objection, that will be placed in the record.

Senator GRASSLEY. I want to read it.

The CHAIRMAN. Do you mind letting us take Senator Cohen so he can get back?

Senator GRASSLEY. No, if Senator Cohen has got a very busy schedule, I do not have to be any place for 20 minutes, I will wait.

The CHAIRMAN. Senator Cohen, we are very glad to have you with us. I believe you have a reputation of being one of the most articulate Members of the Senate and it is an honor to have you here.

Senator COHEN. Well, I am about to disprove that, Mr. Chairman.

The CHAIRMAN. I want to say in the beginning that a few years ago we had a housing bill that attempted to fine people without a trial by jury and I strongly opposed it. I am a great believer in trial by jury. I think a lot of you personally, but you have to do a lot of convincing to get me to go along with fining people without a trial by jury, and I wanted to make that statement to start with.

Senator COHEN. I am going to make my very best effort, Mr. Chairman.

I would like to say at the beginning that Senator Levin, as you know, Mr. Chairman, we are in the course of a markup on the defense bill and Senator Levin is now actively engaged in debate over there and I am going to offer his statement for the record.

The CHAIRMAN. Without objection, we will put the entire statement in the record.

[The prepared statement of Senator Levin follows:]

STATEMENT OF SENATOR CARL LEVIN
BEFORE THE
SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

Mr. Chairman, it is a privilege to follow so able a Senator and so comprehensive and thoughtful a statement of the issues. Senator Cohen has worked long and hard on the Program Fraud Civil Remedies Act, and it's been rather thankless work. When enacted, it will save the federal government and, therefore, the U.S. taxpayers tens of millions of dollars. But that kind of reward gets lost in the nitty-gritty, day-to-day details of getting a technical bill like this passed. Senator Cohen has been willing to commit the time and resources required to do the job, and for that thoroughness and commitment, he deserves our respect and praise.

I understand the basis for this Committee's interest in the Program Fraud bill, because it is, to a large extent, an administrative reincarnation of the False Claims Act. The False Claims Act falls within the jurisdiction of this Committee, and in fact, the bill strengthening that Act has been reported by this committee to the full Senate for floor consideration. I am pleased that you have taken that action, since I am a cosponsor of that bill, too. But I am somewhat perplexed by recently stated concerns over the constitutionality of S. 1134. I am perplexed, because I find it difficult to understand just what in this bill could be constitutionally suspect.

The Program Fraud bill provides an elaborate administrative process for the civil recovery of monies fraudulently obtained from the federal government. It is a civil statute, not a criminal statute. It requires a knowing misrepresentation for liablity and not just negligence or inadvertence. It provides for an administrative hearing before an impartial hearing examiner, who is required to be, in fact, an independent administrative law judge. It contains numerous checks to guarantee procedural fairness on the outcome of the administrative process and the preceding investigation. It allows for federal court review of the final agency action.

Mr. Chairman, I don't know of anything more that the Constitution requires in this situation. In fact, the Constitution would probably be satisfied with less. And that opinion is held not only by Senator Cohen and me, but by well-respected members of the legal community. To quote again from Professor Harold Bruff of the University of Texas Law School:

> "The outcome is a bill that provides substantially (emphasis added) more protection to the interests of affected individuals and firms than due process minima would require."

And he concludes his discussion of S. 1134 by saying:

> "In sum, from the standpoint of the constitutional and administrative lawyer, I think this is not only an acceptable bill, but a good one. I hope that Congress will enact it, so that small frauds against us all will no longer go unredressed."

In drafting this bill, the cosponsors have worked very hard to be extremely fair to the persons who may be subject to this statute. Its passage would allow us to also be fair to the American taxpayer and the legitimate participants in federal programs.

No one should expect to get away with defrauding the federal government, no matter how small the amount involved. Corruption of any kind undermines the public's support for the victimized programs and unfairly jeopardizes those in a program who follow the rules. Corruption in defense contracting hurts the honest contractor; corruption in food stamps hurts the hungry; corruption in housing programs hurts the homeless.

The Program Fraud Bill will allow us to go after fraud cases under $100,000 in a manner less costly and therefore far more likely to be used than a full-blown case in federal district court. By so doing, it will provide better protection for the integrity of our programs and the expenditure of our taxpayer dollars.

A 1981 GAO report on fraud in federal programs identifies a sorry state of affairs that demand an immediate remedy. From a review of 77,000 fraud cases, GAO found that of those referred to the Justice Department, more that 60% were not criminally or civilly prosecuted. In more than 60% of the already identified cases of fraud, the federal government simply walked away from its losses.

I am here with Senator Cohen today to demonstrate my support for quick passage of this legislation. I appreciate the opportunity to deliver my comments on this important bill. Thank you.

STATEMENT OF HON. WILLIAM S. COHEN, A U.S. SENATOR FROM THE STATE OF MAINE

Senator COHEN. Mr. Chairman, I will try to be as brief as possible to articulate the objectives of the bill and to respond to some of the questions that you may have.

As you know, there are 14 other Senators who have cosponsored this legislation, along with Senator Levin and myself. I think it is important to emphasize at the outset of my testimony that we would not create a new category of offenses through this legislation. This is not something new.

It simply establishes an administrative alternative, patterned largely after the civil False Claims Act, that would capture the conduct already prohibited by current law. So, in other words, we are establishing a new remedy for old wrongs. This is not something new that we are doing under the law, Mr. Chairman.

I think you have already heard testimony to the effect that the imputus for this legislation is that a lot of money is currently being lost—falling through the cracks as Senator Grassley has just articulated—by the tens if not hundreds of millions of dollars because of the fact that the Justice Department does not have the resources to litigate cases under $100,000. It simply costs more money to prosecute those cases than they can possibly recover. For that reason, they are not prosecuting the cases which prompts the need for an administrative-type remedy as provided in my legislation.

So we came up with a solution that I believe is both effective and fair. The Program Fraud Civil Remedies Act marks the culmination of our effort to try and balance the needs of the Government to collect money that currently is being lost with the need to protect the individuals who might be subject to these procedures.

This bill is strongly supported by the major players in the fight against fraud. The Justice Department, for one, strongly supports the bill, and I know, Mr. Chairman, the Justice Department would not be in favor as strongly as they are if the bill was going to deprive individuals of their rights to a jury trial, as you suggested.

The General Accounting Office favors the measure. The inspectors general, the Administrative Conference of the United States, the Federal Bar Association, and last the Packard Commission came out with a recommendation urging adoption of this kind of procedure.

All of those organizations, it seems to me, lend fairly heavy support to the need for this type of procedure. First, it would allow the Government to recover money that it is currently losing; second, it is going to provide for a much more expeditious and less expensive procedure to recoup those losses, and, third, it is going to provide a deterrent against future fraud by dispelling the perception that these small dollar cases are simply going to be let go with impunity.

An additional benefit, Mr. Chairman, is that we know it can work. Under the Civil Monetary Penalties Law, the Department of Health and Human Services is authorized to impose penalties and assessments administratively against health care providers who knowingly or have reason to submit claims for services never provided. Since we implemented this particular law, the Department of Health and Human Services has been able to recover some $22 million from over 175 cases. So we already have a procedure on the books, which Health and Human Services is already implementing, recovering millions of dollars in these types of cases.

In the interest of time, Mr. Chairman, I would like to address some of the issues of interest to this committee; namely, the constitutionality and the adequacy of due process protections under S. 1134.

Now, in preparation for the hearing, I asked a number of distinguished legal scholars for their opinions on the legislation. They were unanimous in their view that the bill easily passes constitutional muster. We have Prof. Harold Bruff, of the University of Texas, who said that "no serious constitutional question attends this bill."

We have the American Law Division of the Congressional Research Service who echoed Mr. Bruff's conclusion, saying "the program fraud bill does not raise constitutional issues." The Justice Department, in addition to these scholars, has rejected the argument raised by opponents of the bill that establishing an administrative remedy for small frauds violates the seventh amendment right to a jury trial.

In 1977, the Supreme Court unanimously rejected the constitutional challenge in the *Atlas Roofing* case, which was cited by Senator Hatch, upholding a civil penalty scheme with the same essential features that we have in this legislation.

There was another constitutional challenge which I find even less convincing, and that is the contention that this bill thoroughly strips the Court of jurisdictional authority. This simply is not the case.

As Joseph Kennedy, who is chairman of the Committee of Administrative Judiciary of the Federal Bar Association, has stated:

> The fact that the administrative remedy is subject to oversight by Article III courts under the provision for judicial review insures the constitutionality of this measure, for it has long been recognized that so long as the essential attributes of judicial review such as review of the agency's findings and enforcement of agency orders remain in Article III courts, there is no constitutional impediment to the power of Congress to vest initial adjudication of such rights in Article I courts and administrative agencies.

So what he is saying essentially is as long as there is a right of review which would be in the Court of Appeals, there is no denial of due process under the Constitution in proceeding initially administratively.

Furthermore, nothing in the bill precludes the Justice Department from litigating in Federal court any false claim or false statement, whether it involves $99,000 or $2.

Now, there are a few critics who characterize this bill as a court-stripping bill, and they point to the Supreme Court's decision in *Northern Pipeline Construction* v. *Marathon Pipeline* for their support. I would like to take just a moment to tell you why that is not a valid point.

In the *Marathon* decision, the Court held unconstitutional the provisions of the Bankruptcy Reform Act with which I know you, Mr. Chairman, are familiar. In 1978, when we passed that law, they granted to bankruptcy judges, who are article I judges, jurisdiction over all civil proceedings arising under the Bankruptcy Act of the United States.

The Supreme Court held that suits involving private rights—in this case, breach of contract—are solely within the jurisdiction of article III courts, and so they struck that down by trying to confer article III powers on article I judges. That, however, dealt with private rights.

In this particular case, we establish an administrative remedy to deal with public rights; that is, suits between the Government and others.

I would like to include in the hearing record, Mr. Chairman, a copy of the Justice Department's testimony before the Government Affairs Subcommittee as well as other documents in support of the bill's constitutionality.

[The material referred to follows:]

STATEMENT

OF

RICHARD K. WILLARD
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

It is a pleasure to appear before the Subcommittee to present the Administration's views on S. 1134, the Program Fraud Civil Penalties Act, a bill to provide for an administrative remedy for false and fraudulent claims submitted to the government. We strongly support this legislation, Mr. Chairman, and want to compliment you and Senator Roth for your leadership in this area. I should stress at the outset that the Administration fully shares Congress's concern about false claims and statements made to the government. In order to strengthen our remedies against such wrongdoers, the Administration will soon send to Congress the "Fraud Enforcement Act of 1985," a major legislative initiative to reinforce our anti-fraud efforts. We look forward to working with the Committee on this proposal, as well as S. 1134.

I.

Before turning to the provisions of your bill, Mr. Chairman, I would like to place this legislation into context by reviewing the Justice Department's role in the investigation and prosecution of false and fraudulent claims. The need for S. 1134 becomes apparent when seen in relation to the Justice Department's large and growing responsibilities for the prosecution of complex, white-collar fraud cases. It is critical that we be able to delegate the smaller civil fraud cases to departments and agencies if we are to meet our other obligations.

In the last fiscal year, the thirty attorneys in the fraud section of the Civil Division obtained judgments and settlements in excess of $60 million, a significant improvement over prior years. We have 853 cases currently pending in the Civil Division and our recoveries average in the neighborhood of $1 million for each case which we deem to warrant civil action. Additional hundreds of False Claims Act cases are delegated to the United States Attorneys' offices each year.

As you know, Mr. Chairman, the United States has both civil and criminal remedies which it may pursue in prosecuting fraud. While we should never neglect the potential for criminal sanctions, especially in particularly egregious cases, civil sanctions can be equally powerful. As a general rule, our civil fraud prosecution effort is only as good as the criminal and administrative investigations on which nearly all civil fraud cases are based. FBI reports are one major source of leads. However, in recent years, the Inspectors General have provided a growing share of our civil fraud referrals.

The various civil remedies available to us provide a substantial deterrent to the submission of false and fraudulent claims. Because of the double-damages remedy in the False Claims Act, the government can often recover substantial sums in such prosecutions. Finally, because it requires a lower burden of proof, a civil action may be a more realistic course in close cases.

A diligent and tenacious anti-fraud effort serves to reinforce public confidence in the integrity and efficiency of government programs. At a recent speech in Boston, the Attorney General reiterated the need to aggressively prosecute white-collar crime. He noted that fraud committed against the United States, particularly fraud in defense procurement, has and will continue to receive high priority by the Department.

With that as background, Mr. Chairman, I will now turn my attention to S. 1134.

II.

S. 1134, like S. 1566, the predecessor bill introduced in the last Congress, would establish an administrative forum to prosecute the submission of false claims and false statements to the United States. We believe that a mechanism for resolution of many fraud matters through administrative proceedings is long overdue. Many of the government's false claims and false statement cases involve relatively small amounts of money compared to matters normally subject to litigation. In these cases, recourse in the federal courts may be economically unfeasible because both the actual dollar loss to the government and the potential recovery in a civil suit may be exceeded by the government's cost of litigation. Moreover, the large volume of such small fraud cases which could be brought would impose an unnecessary burden on the dockets of the federal courts.

Several cases illustrate the types of matters for which these administrative proceedings are best suited.

> --In the first case, we brought a False Claims Act suit against several real estate brokers and a mortgage company for fraudulently inducing the Veterans Administration to guarantee three mortgage loans. The VA sustained damages of $13,100 on the three loans. While we ultimately recovered well in excess of that amount under the False Claims Act, the congested nature of the district court's docket meant that the litigation took over six years to conclude.
>
> --Numerous matters are referred to the Department involving, for example, FHA-insured home improvement loans obtained through fraud, social security or CHAMPUS benefits obtained through misrepresentations regarding eligibility, or fraudulent overcharges on small contracts in which traditional civil and criminal litigation are simply impracticable because of the size of the government's claims and the large number of such cases.

Administrative resolution of such small cases will, in our view, address this problem by establishing an expeditious and inexpensive method of resolving them. At the same time, administrative resolution of smaller cases would permit a more efficient allocation of the resources of the Department of

Justice, thus enhancing the Administration's efforts to control program fraud.

Fortunately, legislative efforts in this area can be guided by the experience of the Department of Health and Human Services under the Civil Money Penalty Law, 42 U.S.C. 1320a-7a, a similar administrative money penalty statute which has been in effect for several years. Under that law, HHS has recovered over $15 million in fraudulent overcharges under the medicare and medicaid programs. Inspector General Kusserow and the entire Department are to be commended for their efforts. HHS's successful experience testifies to the great savings which could be achieved if this authority were extended government-wide.

A particularly important issue posed by this legislation is the element of scienter necessary to prove a violation. Section 802 does not require the imposition of civil penalties simply because a claim or statement is false. As subsection (a) provides, a false claim or statement must be knowingly made, or knowingly caused to be made, before liability attaches. This element of scienter -- in this context, knowledge of the falsity of the claim or statement -- is central to the liability-defining provisions of section 802. It has long found expression in the False Claims Act, and insures that the bill will not punish contractors who have honest disputes with the government. Under the bill, just as under the False Claims Act, a contractor who, through negligence or misinformation, submits erroneous data to the United States, would not be subject to liability. However, a contractor who submits erroneous data would be liable if he knew, or had reason to know, that it was erroneous when he submitted it.

We believe that these well-developed scienter concepts in section 802 fully protect honest contractors. The False Claims Act, upon which section 802 draws, has been in place since 1863, and we are unaware of any case under the Act in which a contractor has been punished for an honest dispute with the government. We accordingly see no need to engraft upon the existing scienter standard in section 802 another requirement that a knowingly false claim must be accompanied by an intent to defraud. In our experience, intent requirements in the civil area lead to confusion and impose an overly-stringent burden upon the government. The False Claims Act is not generally interpreted to require a showing of intent, see, e.g., United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973), and we do not believe that such an intent requirement should be imposed here.

We believe that the administrative proceedings outlined in section 803 preserve full due process rights, including the rights to notice, cross examination, representation by counsel and determination by an impartial hearing officer, and thus will withstand constitutional challenge. The use of a hearing examiner, or Administrative Law Judge, to compile a factual record and make an initial determination is a common, legally unobjectionable method to administer federal programs. Critics of the use of hearing examiners can point to no legal precedent questioning this administrative hearing mechanism, and, in fact, it has consistently been upheld against court challenge. See, Butz v. Economou, 438 U.S. 478, 513-4 (1978); NLRB v. Permanent Label Corp., 687 F.2d 512, 527, (Aldisert, C.J., concurring).

Criticism of the hearing examiner's supposed lack of independence conveniently ignores these well established precedents as well as several protections built into S. 1134. While the hearing examiner would be an employee of the agency, section 803(f)(2)(C) of the bill assures the hearing examiner an appropriate level of independence by providing that he shall not be subject to the supervision of the investigating or reviewing official, and could not have secret communications with such officials. The bill thus incorporates the generally accepted protections required by the Administrative Procedures Act. And, of course, any adjudication of liability under this bill would be subject to independent review in the Court of Appeals by an Article III judge.

In light of the Supreme Court's holding in Atlas Roofing Co. v. Occupational Safety and Health Administration, 430 U.S. 442 (1977), we do not believe that these proceedings would violate the Seventh Amendment's guarantee of trial by jury. In Atlas Roofing, the Court rejected a Seventh Amendment challenge to the administrative penalty provisions of the Occupational Safety and Health Act of 1970 because it concluded that Congress had created new rights which did not exist at common law when the Amendment was adopted. The Court held that:

> when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law".

430 U.S. at 455. The rights created here are not co-extensive with any common law cause of action known when the Seventh Amendment was adopted. In addition, we believe that this statute may, like the False Claims Act, be characterized as a "remedial" statute imposing a "civil sanction". See United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). Given these considerations, the administrative proceedings do not deny unconstitutionally trial by jury.

With respect to this last point, I note that some have suggested that because S. 1134 provides for double damages, it can no longer be viewed as "remedial" and, instead, must be classified as "punitive", presumedly requiring a criminal standard of intent and burden of proof. However, this analysis of the bill is overly-simplistic and does not comport with traditional practice and applicable precedent, including several decisions of the Supreme Court.

Double damages serve an appropriate remedial purpose in several respects. Because of the deceptive and concealed nature of fraud, the government will rarely be able to prove the entirety of its loss. Thus, by establishing a form of "liquidated damages," this provision insures that the government will be made whole. Second, the double-damages provision partially compensates the government for its costs of investigation and prosecution. Finally, this provision has a socially useful deterrent effect.

In 1943, the Supreme Court was called upon to decide just this issue relative to a nearly identical provision in the False Claims Act. The Court unequivocally ruled that the double damage provision of that Act was a permissible statutory enactment, civil and remedial in nature and consistent with other statutes, such as the treble damage provisions of the civil antitrust laws. Writing for the Court, Justice Black stated:

> We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it. *** Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from the frauds which may be practiced upon him.

U.S. ex. rel. Marcus v. Hess, 317 U.S. 537, 549-50 (1943). See also, Day v. Woodworth, 54 U.S. (13 Howard) 361, 371 (18561); Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 523 (1885).

Finally, questions were raised in the last Congress as to the effect which a finding of liability under this Act would have on a subsequent administrative proceeding to suspend or debar a contractor. In the past, such an amendment has been proposed with the stated objective of preventing the use of a civil penalty judgment in debarment or suspension proceedings. We believe that amending the bill to deny any evidentiary value to a civil penalty judgment in any administrative, civil or criminal proceeding is wholly inappropriate. The civil penalty proceedings envisioned by the bill will afford a full measure of due process protections, as well as the opportunity for judicial review of the proceedings. In view of this consideration, we believe that there is no justification for disturbing the normal rules of res judicata and collateral estoppel, and requiring another tribunal to go through the costly exercise of retrying the same facts that have already been established under the same standard of proof in a civil penalty proceeding.

In addition, we believe that it is important to note that a contractor would always be free to argue the question of remedy in a suspension or debarment proceeding. According res judicata or collateral estoppel effect to the facts underlying a civil penalty judgment in a later suspension or debarment proceeding would not necessarily establish that suspension or debarment was the appropriate remedy. A contractor would still have the opportunity to argue that he should not be suspended or debarred and that some lesser sanction -- or no sanction at all -- should be imposed.

III.

While we thus endorse many of the essential provisions of S. 1134, we believe that the bill could be improved along certain lines.

First, we urge the Committee to reconsider the desirability of section 804(a)(3), which permits Inspectors General and other investigatory officials to use compulsory process to obtain testimonial evidence as part of an investigation. Under the existing provisions of the Inspector General Act of 1978, Inspectors General are authorized to compel production of documentary evidence. Neither the Inspectors General, nor the Federal Bureau of Investigation -- the government's principal law enforcement investigatory agency -- currently issue investigative subpoenas to compel testimony. The potential for the unlimited exercise of testimonial subpoena powers during investigations might raise due process issues as well as interfere with the criminal investigation process. In addition, there would be no central coordinating authority so as to ensure consistency of standards and implementation. In this manner, section 804(a)(3) could adversely affect coordinated law enforcement. The Administration urges that the Committee delete section 804(a)(3) from the bill.

Second, in the civil fraud area, collection of sums owed is often as difficult as winning a judgment itself. Last year's bill, S. 1566, recognized this difficulty and provided the United States with setoff authority to aid in collections, thus clarifying and reinforcing our setoff authority under common law. The government should be authorized to collect judgments obtained under the Program Fraud proceeding by deduction from amounts otherwise owed by the United States. We were disappointed to see that this provision was not included in S. 1134, and would urge the Committee to restore it. Incidentally, under section 2653 of the Deficit Reduction Act of 1984, the United States was given authority to collect debts owed to it (including judgments such as this) from tax refunds.

Third, section 803(f)(2)(F) of the bill provides that if the agency chooses to adopt regulations governing hearings (as opposed to simply following the requirements of the APA), such regulations, in addition to the full due process rights provided by section 803, must provide for a right of discovery, "to the extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair and reasonable consideration of the issues." The right to discovery is not provided under the APA and is rarely available in administrative hearings. We believe that discovery is inappropriate in administrative proceedings and will unduly delay the process. Opening this streamlined administrative process to the abuses inherent in civil discovery would defeat the purpose of such an alternative dispute resolution mechanism. We do not believe that the right of discovery should be available here.

Fourth, because it is not our intention to use this administrative mechanism as a substitute for criminal prosecution, we suggest that the bill be amended to clarify that it does not alter existing obligations of agency officials (especially the IGs) to report evidence of criminal conduct to the Attorney General. The investigating official should report evidence of fraud to the Department of Justice as soon as it comes to his attention, and certainly at the same time that he refers a case to a reviewing official. Consistent with the IGs' existing responsibilities under the 1978 Inspector General Act, this would permit us to determine not only whether the case should be prosecuted civilly under the False Claims Act, but also whether to bring a criminal fraud prosecution. Similarly, the reviewing official should not be able to settle a case without informing the Department of Justice.

Finally, we have some concern about the amount of the penalty which may be assessed under S. 1134. The False Claims Act provides a $2,000 forfeiture (in addition to double damages) for each false claim. We agree that this amount (which has been unchanged since 1863) should be adjusted upward, but believe that a $5,000 forfeiture would be more appropriate than the $10,000 amount contained in the bill.

More seriously, we are uncertain about the scope of the double-damages remedy. The bill provides that a person convicted "shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim." § 802(a)(1) and (2). This phrase is subject to two interpretations: the damages are equal to either twice the entire amount of the claim, or to twice the amount of the fraudulent portion of the claim. We feel that the latter reading, which is consistent with judicial interpretations of the government's remedies under the False Claims Act, is the preferred one. Under the jurisdictional section, § 803(c), this Act may be used for any claim where the amount fraudulently requested is less than $100,000. Thus, a claim for a $20-million airplane which includes a fraudulent request in the amount of $5,000 could be adjudicated under S. 1134. While such fraud should be punished, we think that a $40-million, double-damage assessment clearly would be excessive. We believe that the amount of the penalty should also reflect this jurisdictional limit, lest it be used to assess truly disproportionate penalties.

That concludes my prepared statement, and I would be happy to answer any questions.

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APR 15 19

April 11, 1986

The Honorable William S. Cohen
United States Senate
Chairman, Subcommittee on Oversight of Government Management
Senate Committee on Governmental Affairs
Washington, D. C. 20510

Dear Senator Cohen:

I am pleased to respond to your request for my views on the constitutionality of S. 1134, the Program Fraud Civil Remedies Act. Perhaps I should preface my remarks by summarizing my qualifications. I have taught courses in administrative and constitutional law for a decade, and have published a number of articles in those fields, as my enclosed resume indicates. I am also one of the authors of a casebook, Robinson, Gellhorn & Bruff, The Administrative Process (West, 3d ed. 1986).

I have reviewed S. 1134 and the ably prepared report of the Committee that accompanies it. No serious constitutional question attends this bill. Indeed, the Committee is to be commended for its effort to respond to concerns voiced by those subject to the bill's processes. The outcome is a bill that provides substantially more protection to the interests of affected individuals and firms than due process minima would require. And that is as it should be-- Congress does well to respond to concerns about fairness in a more sensitive way than can courts that are articulating mandatory constitutional requisites. S. 1134 not only passes due process scrutiny; from a broader policy-based standpoint, it goes as far to protect those charged with fraud as is possible without impairing the Government's efforts to obtain remedies that will protect the public fisc.

S. 1134 employs (or parallels) the Administrative Procedure Act's processes for full-scale adjudication, 5 U.S.C. §§ 554-57, and adds some protections for the respondent. There can be little doubt that APA procedures would themselves satisfy due process criteria. No one has seriously suggested that the APA falls short of due process in situations where, as here, evidentiary hearings are appropriate. Instead, the cases deal with such issues as the propriety of interim deprivations of property while APA hearings are pending, e.g., Mathews v. Eldridge, 414 U.S. 319 (1976). Moreover, S. 1134 goes well beyond the APA in response to the concerns of prospective respondents, for example in its provision for discovery. Thus, the Committee has adapted generally applicable procedures to the special needs of the program fraud context. The Supreme Court has made it clear in the leading Eldridge case that Congressional judgments on such matters are entitled to substantial deference from courts deciding due process challenges. Therefore, if there is a due process infirmity in this bill, it will have to be in something other than its use of APA procedures, modified in ways advantageous to the respondent.

Some special concern has been expressed about the bill's use of a preponderance as the standard of proof. The Supreme

Court has recently held that a preponderance is the generic standard of proof in APA adjudications, and that it is appropriately used in determining whether the antifraud provisions of the securities laws have been violated. Steadman v. SEC, 450 U.S. 91 (1981). That should put the matter to rest in this context.

Nevertheless, related issues of fairness concerning the proof of fraud may arise. In particular, I think use of the preponderance standard is of less importance than substantive requirements for what is required to be proved, procedural guarantees of the independence of the adjudicator, and appellate provision for review of the determination of fraud. I will consider each of these in turn.

First, the bill has been altered to require proof of either actual knowledge of the fraudulence of a claim or gross negligence in not examining the basis of a claim. This is a tough standard of substantive proof; it clearly eliminates simple mistake or ordinary negligence. Given the difficulty of proving knowledge, the Government should bear no higher burden.

Second, guarantees of the independence of an adjudicator are probably more important assurances of fairness than the proliferation of formal process, as the late Judge Friendly observed in "Some Kind Of Hearing," 123 U.Pa.L.Rev. 1267, 1279 (1975). Here, the use of an Administrative Law Judge or someone similarly qualified is an effective guarantee of independence. Moreover, there are two administrative checks on the charging decision, one by the reviewing official within the agency, and the other by the Department of Justice. It is hard to know what more could reasonably be asked.

Third, appellate review of the determination of fraud follows the normal pattern in administrative law. First, review by the agency head provides another administrative check on fairness. Second, judicial review is provided under the normal criteria of the substantial evidence rule. Again, this is the normal maximum set of protections for affected individuals.

Another question that has been raised concerns whether the Seventh Amendment might require a jury trial in the program fraud context. This is, quite simply, not a serious contention. In Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), the Supreme Court unanimously rejected a Seventh Amendment challenge to a civil penalty scheme with the same essential features as this one. The Court comprehensively reviewed its precedents, which certainly foreshadowed the result in Atlas Roofing, and rejected any requirement for juries in administrative penalty proceedings, using strong language which is quoted in the report of your Committee. One would have to think that the Court did not mean what it said and held in Atlas Roofing and a host of earlier cases to think there is a serious argument for a right to a jury here. In passing, I would note that one reason for the Court's reluctance to extend jury rights into the administrative context is the presence of other controls on the fairness of factfinding, of the sort that S. 1134 contains.

In sum, from the standpoint of the constitutional and administrative lawyer, I think this is not only an acceptable bill, but a good one. I hope that Congress will enact it, so that small frauds against us all will no longer go unredressed.

Sincerely,

Harold H Bruff

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Government Service:

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Arizona State University, Assistant Professor of Law, 1971-73; Associate Professor, 1973-76; Professor, 1977-79.

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Publications:

Articles:

Unconstitutional Conditions Upon Public Employment, New Departures in the Protection of First Amendment Rights, 21 Hastings Law Journal 129 (1969).

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Work in Progress:

Casebooks:

The Law of Presidential Power (with Peter M. Shane) (draft ed. 1985).

Texas Government (draft ed. 1985).

Article:

On Oversight of the Regulatory Agencies, forthcoming 1986, American Univ. Law Review. (Paper presented at American University Conference, April 4, 1986).

Consulting:

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Testimony:

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Committee on Rules, U.S. House of Representatives, March 21, 1984.

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THE AMERICAN UNIVERSITY
WASHINGTON, D.C.

April 18, 1986

Honorable William S. Cohen
Chair, Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
U.S. Senate
Washington, DC 20510

Dear Senator Cohen:

This responds to your letter of April 9, 1986, requesting my views of the constitutionality of S. 1134, 99th Cong., 1st Sess. (1985). This is the proposed Program Fraud Civil Remedies Act, which would add a new Chapter 8 to Title 5, U.S. Code. The chapter would provide for an administrative system under which civil monetary penalties could be imposed for false claims and statements to the United States by recipients of property, services, or money from the United States, including parties to government contracts. The bill's objective is to supplement existing provisions for criminal and civil actions brought by the United States for fraud in relationships involving the government. *Cf.* 31 U.S.C. §3729 and 18 U.S.C. §§ 287 & 1001. As stated in your letter, because of the costs of litigation and the need to make a reasonably efficient use of enforcement resources, "small dollar" cases, defined as those involving a claim of less than $100,000, are often not pursued by the United States. This bill is designed to provide a system of administrative remedies that can be used by agencies to pursue such relatively smaller claims.

Two major constitutional issues have been raised about this bill. First, it has been asked whether the use of an administrative adjudicatory system -- without the apparatus of the common law trial by jury -- would violate the Seventh Amendment's guarantee of a jury trial "[i]n suits at common law, where the value in controversy shall exceed twenty dollars . . . ." A subordinate but related question is whether, even if the Seventh Amendment's protection does not apply here, the Sixth Amendment's guarantee of an impartial jury in "all criminal prosecutions" might pertain, on the theory that the bill's remedies might be deemed penal in nature. Second, it has been asked whether the bill's procedures for adjudicating cases involving alleged false claims to the United States satisfy the requirements of due process.

While I have had only a brief time in which to review the bill, I am happy to provide my reactions and reasons for them. To summarize, I do not believe that the bill has a constitutional deficiency. The law relating to the Seventh Amendment jury trial requirement is quite generous in the leeway granted to Congress in establishing administrative remedies for violations of public duties. This bill seems well within the scope of such Congressional power. Moreover, since this bill expressly provides for civil monetary penalties for false claims made to the United States, I believe that the Seventh, not the Sixth, Amendment contains the pertinent jury trial provision. Furthermore, the bill's provisions for notice, opportunity to be heard, and related protections do appear fully to satisfy the requisites of due process. In this regard, it bears noting that the bill contains separation of functions provisions analogous to those in the Administrative Procedure Act, 5 U.S.C. §554(d). While not specifically required by due process, such a provision serves the larger aim of fostering impartiality in adjudicative decisionmaking, which is mandated by due process.

Having stated my conclusions first, allow me to summarize the reasoning which has lead me to them.

As to the jury trial issue, it is well established that the Seventh Amendment preserves the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted" in 1791. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1913); *see also Atlas Roofing Co. Inc. v. OSHRC*, 430 U.S. 444, 449-461 (1977); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Parsons v. Bedford*, 3 Pet. (28 U.S.) 433, 446-48 (1830). The term "common law" was used in contrast to suits in which equitable rights and remedies alone were acknowledged at the time of the Amendment's framing. *See Parsons v. Bedford, supra*. The term does not apply to cases arising under the admiralty or maritime jurisdiction, which are tried without a jury, or to cases involving statutory proceedings unknown to the common law. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 572 (1962); *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

In the present instance, one might conceivably argue that an action based on an alleged false claim to the United States is in the nature of a contract or tort action, for it might be said to rest on a contractual undertaking or a claim of fraud or misrepresentation, and thus might be assimilated to actions that were known at common law. But this would appear to be an unduly strained contention. It disregards the long line of cases upholding Congress' power to fashion administrative remedies for violations of statutory duties, as here.

Notably, in *Atlas Roofing*, *supra*, the Supreme Court held that the Seventh Amendment does not prevent Congress from assigning to the Occupational Safety and Health Review Commission the task of adjudicating workplace safety violations and imposing civil monetary penalties for them. The Court limited its holding to cases involving statutorily created "public rights":

> Our prior cases support administrative factfinding in only those situations involving 'public rights,' e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. *Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated*. (430 U.S. at 458) (emphasis added)

Surely, if this bill were to become public law, a violation of its provisions would not amount to a "wholly private" case. Rather, it would be grounded ultimately on the statute's definition of a wrong and its provision for civil monetary penalties.

For the sake of argument, we should consider whether there is a material distinction between this bill and the law at issue in *Atlas Roofing*. One argument might be that the latter created new statutory obligations, whereas, according to the report of the Senate Committee on Governmental Affairs, S.1134 "would *not* create a new category of offenses" but would "capture only *that* conduct already prohibited by federal criminal and civil statutes . . . ." S. Rep. No. 212, 99th Cong., 1st Sess. 10 (1985) (emphasis in original). This argument would seek to draw determinative meaning from the statement in Atlas Roofing that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible . . . ." 430 U.S. at 456 (emphasis added).

However, such an attempt to distinguish Atlas Roofing is unconvincing. First, S.1134 would add a chapter to Title 5, U.S. Code, which contains new language dealing with "false claims and statements" to the United States. Even if a new "category" of offenses may be said not to have been created, a new offense will have been fashioned. Second, in any event Atlas Roofing does not turn on the "newness" of the statutory duty so much as on the facts that the duty and the attendant remedies were statutorily created and not predicated on the common law. The latter characteristics chiefly distinguish an administrative adjudicatory scheme -- such as the one in S.1134 -- from suits triggering a jury trial requirement.

Furthermore, courts repeatedly have reaffirmed the Atlas Roofing principle in subsequent cases involving disparate situations. See, e.g., Keith Fulton & Sons v. New England Teamsters, 762 F.2d 1124, 1132 (1st Cir. 1984); Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628, 642 (4th Cir. 1983) ("Congress may constitutionally enact a statutory remedy, unknown at common law, vesting factfinding in an administrative agency or others without the need for a jury trial"); Mynon v. Hauser, 673 F.2d 994, 1004 (8th Cir. 1982); Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981); Essary v. Chicago & N.W. Transp. Co., 618 F.2d 13 (7th Cir. 1980); McGowan v. Marshall, 604 F.2d 885 (5th Cir. 1979); Buckeye Industries, Inc. v. Secretary of Labor, 587 F.2d 231 (5th Cir. 1979); Rosenthal & Co. v. Bagley, 581 F.2d 1258, 1261 (7th Cir. 1978). Accordingly, there is no reason to doubt Atlas Roofing's continuing vitality in the present circumstances.

With regard to the question about the Sixth Amendment, as sketched above, the short answer is that S.1134 is a civil monetary penalty statute, not a statute calling for a criminal prosecution. As such, the Seventh, not the Sixth, Amendment applies. It also bears noting that the Supreme Court has recognized that civil penalties can assume various forms, and such penalties do not easily lose their "civil" status by straying beyond some rigidly confined notion of such penalties. See United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938).

Finally, with regard to the due process issue, an initial distinction should be drawn between the bill's adjudicatory procedures -- which afford a considerable measure of procedural protection to those who allegedly have made false claims to the United States -- and the procedures' actual operation in specific factual settings. The latter, of course, could raise independent due process concerns. Indeed, litigants often urge a due process claim in particularized factual circumstances that may not have been precisely anticipated in terms of a statute's general procedural provisions. Such a concrete contest necessarily lies beyond the scope of these comments.

Focussing on the bill's procedures, it must be said that they establish a rather elaborate set of safeguards. To begin with, the bill requires that any hearing under it must be held "on the record." (§803(e)). Section 803 (f)(2) also specifies a number of procedural requirements for such a hearing. These include written notice to any person alleged to be liable under the bill regarding the time, place, and nature of the hearing;

the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law to be asserted by the agency. Also, any such person is to have the opportunity to submit facts, arguments, and offers of settlement or adjustment, and in particular to present a case through oral or documentary evidence, to submit rebuttal evidence, and "to conduct such cross-examination as may be required for a full and true disclosure of the facts." (§803(f)(2)(E)). There is specific provision for the right to counsel. There also is a separation of functions provision that seeks to insulate the hearing examiner from the investigating and reviewing officials. (§803(f)(2)(C) & (D)). In addition, there is a requirement that the hearing examiner not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to the hearing to participate. . . . ." (§803(f)(2)(C)(i)). And there is a requirement that the hearing officers conduct the hearing "in an impartial manner." (§803(f)(2)(G)). The hearing examiner is to issue a written decision, including findings and determinations in the case (§803(g)). Furthermore, there are provisions for administrative and ultimately judicial review of the hearing examiner's decision. (§§803(h)(2) & 805).

Taken as a whole, these procedures are similar to those of the Administrative Procedure Act for agency adjudications. *See* 5 U.S.C. §§554 & 556. In general, the procedures seem fully adequate on their face for purposes of due process. *See* *Withrow v. Larkin*, 421 U.S. 35 (1975) (discussing the importance of a fair trial without bias by the decisionmaker); *cf.* *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). If any particular questions about specific procedural protections -- or, for that matter, another issue -- should arise, I of course would be glad to address them.

I hope that these remarks will be of assistance. Thank you for the opportunity to comment on S.1134.

Sincerely,

Thomas O. Sargentich

Thomas O. Sargentich
Associate Professor of Law

TOS:ajs

Federal Bar Association

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April 16, 1986

Senator William S. Cohen
Chairman
Senate Subcommittee on Oversight
  of Government Management
Committee on Governmental Affairs
Senate Hart Office Building, Room 322
Washington, D.C. 20510

Re: S. 1134

Dear Senator Cohen:

The Committee on the Administrative Judiciary is pleased to respond to the concerns expressed over the constitutionality of the administrative remedy for civil fraud found in the proposed Program Fraud Civil Remedies Act.

The report by the Oversight Subcommittee on S. 1134 contains an accurate summary of the state of the law on the constitutionality of an administrative remedy for civil penalties. S. Rep. 99-212, 99th Cong., 1st Sess. 30-34 (1985). Further, an exhaustive review of the writings of the leading authorities in the field of administrative law such as Professors Davis, Gellhorn, Stewart and Schwartz as well as the decisions of the federal courts show support for the assertion that a combination of investigative, prosecutorial and adjudicative functions in a single regulatory agency violates constitutional due process is scant to nonexistent.

Because S. 1134 does not involve a question of enforcing private rights, there is no need to consider whether the enforcement mechanism trenches on the judicial power traditionally and constitutionally vested in the Article III courts. See *Northern Pipeline* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Nor is there any question as to the constitutional authority of Congress to create a civil administrative remedy for frauds against the Government. In the language of *Atlas Roofing*, 430 U.S. 450, S. 1134 is a plain and simple instance in which the "Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."

Since *Atlas*, the courts have gone even further and held that Congress may constitutionally grant an administrative agency, the Commodities Futures Trading Commission, the power to investigate, prosecute and decide, without a jury trial, the liability of commodity brokers for fines and reparations for frauds committed against private parties, their customers.

The court reasoned that because the "reparations" right was created by a statute that entrusted its enforcement to an administrative agency the case did not involve purely private rights. Myron v. Hauser, 673 F. 2d 994 (8th Cir. 1982). As the Oversight Subcommittee report points out, history and the decisions of the Supreme Court support the proposition that the right to a jury trial turns not only on the nature of the issue to be resolved but also on the forum in which it is to be resolved. S. Rep., supra, 31. Since S. 1134 involves the enforcement of public rights the choice of forum is clearly up to Congress.

With respect to the claim that the combination of functions of investigator, prosecutor and judge in an administrative or executive branch agency raises serious questions about the fairness of the process accorded accused individuals or corporations, we believe the provisions of the APA incorporated in S. 1134 satisfies all the requirements of substantive and procedural due process.

It is, of course, well settled that if administrative adjudicators are not afforded adequate protection against bureaucratic, and therefore political, intrusions into their role, their objectivity and independence will be compromised. Both the APA (5 U.S.C. § 554(d)) and S. 1134 (§ 803(f)(2)(C)(ii)) accomplish this by providing that no hearing officer may "be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions of any agency." This provision is the heart of the separation of functions concept and makes the administrative adjudicatory process constitutionally viable. This provision offers the needed protection against institutional bias and interest which an agency has in enforcing its enabling statute and regulations. Adjudicators will be functionally insulated from ex parte influences and pressures of investigators, prosecutors and, of course, agency heads and their staffs. Further, they may not consult ex parte with "any person or party on any fact in issue" (5 U.S.C. § 554(d)) or with any "interested person" with respect to any issue "relevant to the merits of a proceeding", except as authorized by law. (5 U.S.C. § 557(d)).

As the Supreme Court noted in Butz v. Economou, 438 U.S. 478, 513 (1978), " . . . the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency."

An instructive view of the dual nature of the independence conferred by the APA on administrative law judges is set forth in an opinion of Attorney General Levi. 43 Op. Attn. Gen. 1 (1977). There General Levi pointed out that the "independence of status of administrative law judges" as distinguished from their "decisional independence" or "independence of action" in hearing and deciding particular cases is set forth in section 11 of the original APA, now codified in Title 5, §§ 1305, 3105, 3344, 4301(2)(E), 5372 and 7521. As to the latter, the Attorney General stated that in the APA Congress intended to confer "decisionmaking autonomy" upon hearing officers in order to attract "high quality officers" and, more importantly, to insure against any possible "unfairness involved in the commingling of adjudicatory and prosecutory functions. See Wong Yang Sung v. McGrath, 339 U.S. 33, 44 (1950)." Id. at 4.

The legislative history of § 556(c) of the APA shows the powers conferred on administrative law judges to ensure their "independent judgment" were "designed to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman. He would have and should independently exercise all the powers numbered in the subsection. The agency . . . itself should not in effect conduct hearings from behind the scenes where it cannot know the detailed happenings in the hearing room and does not hear or see the private parties." Id. at 5.

The Attorney General then noted that while the "separation of functions" provisions do not technically apply to agency heads, "that does not implicitly sanction intervention by the agency head before the administrative law judge has decided the case; rather it was meant to eliminate what would otherwise be the effect of excluding agency heads from reviewing decisions, or even from supervising presiding officers in formal proceedings with respect to purely administrative matters." Id., n. 4.

We all agree with the proposition laid down in 1610 in Bonham's Case that "no man shall be a judge in his own cause." The difficulty lies in discovering the kind of activity a man must engage in before the cause becomes his own. For example, in NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947) and Pangburn V. CAB, 311 F. 2d 349 (1st Cir. 1962) the courts held that "prior involvement in a particular case" does not disqualify a judge or agency "from subsequently passing on adjudicatory facts." And in Withrow v. Larkin, 421 U.S. 35, 47 (1976); FTC v. Cement Institute, 333 U.S. 683, 700-703 (1948); and Hortonville School District v. Hortonville Ed. Assoc., 426 U.S. 482, 493 (1976), the Supreme Court held that mere familiarity with the facts of a case gained by a tribunal in the performance of its statutory role does not disqualify it as a decisionmaker.

Thinking about the problem of commingling of functions was rather crude in its early stages and is still often crude in the popular polemics. The reason for the unsoundness of any broadside condemnation is that the principle which opposes the combination of functions has to do with individuals, not with large and complex organizations. For an individual to serve as both advocate and judge in a case is obviously improper. But it is not improper even in a criminal case for a large institution, the state, to prosecute through one officer, the prosecuting attorney, and to decide through another, the judge. Even juries function as arms of the state whether acting as grand inquisitors or triers of fact.

The fact that the administrative remedy is subject to oversight by the Article III courts under the provision for judicial review ensures the constitutionality of S. 1134. For it has long been recognized that so long as the essential attributes of judicial power such as review of agency findings and enforcement of agency orders remains in the Article III courts there is no constitutional impediment to the power of Congress to vest initial adjudication of such rights in Article I courts and administrative agencies. Crowell v. Benson, 285 U.S. 22 (1932); Northern Pipeline Co., supra; Kalaris v. Donovan, 697 F. 2d 376, 386 (D.C. Cir. 1983).

In sum, this committee finds the challenges to the constitutionality of the administrative remedy for program fraud created by S. 1134 are lacking in merit.

Respectfully yours,

Joseph B. Kennedy

Joseph B. Kennedy
Chairman
Committee on Administrative Judiciary
D.C. Chapter, Federal Bar Association

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

April 21, 1986

To: Senator William S. Cohen
Attention: Jeff Minsky

From: American Law Division

Subject: Constitutionality of S. 1134—A Bill to Provide Administrative Civil Penalties for Certain False Claims and Statements

This will respond to your inquiry and our conversations regarding S. 1134, a bill to provide administrative civil penalties for certain false claims and statements. Specifically, you have asked that we review the bill, as reported, for the purpose of analyzing whether the bill raises constitutional issues under the Seventh Amendment or the Due Process Clause.

We have reviewed the bill and the appropriate constitutional authorities, and it appears that the bill does not raise constitutional issues. Our analysis follows.

The Provisions of S. 1134

On May 15, 1985, Senators William S. Cohen, William V. Roth, Jr., Sam Nunn, Carl Levin, and Lawton Chiles, introduced S. 1134, a bill to provide certain administrative civil penalties for false claims and statements made to the United States by certain recipients of property, services, or money from the United States, by parties to contracts with the United States, or by federal employees. Somewhat different legislation, similar in purpose to the current legislation, was introduced, and was the subject of committee hearings, in both the 97th Congress and the 98th Congress.[1]

On December 10, 1985, The Senate Committee on Governmental Affairs reported S. 1134.[2] During the Committee consideration of the bill, a hearing was held at which many legal issues were discussed,[3] and an extensive case in support of the legislation has been offered.[4] As reported by the committee,[5] the bill provides for a civil penalty of up to $10,000 and for an assessment of double the amount of certain improper claims made against the United States. Section 802 provides, in pertinent part:

> (a)(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know--
> (A) is false, fictitious, or fraudulent;
> (B) includes or is supported by any statement which violates paragraph (2) of this subsection; or
> (C) is for payment for the provision of property or services which the person has not provided as claimed,
> shall be subject to, in addition to any other remedy that may be

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[1] On April 1, 1982, a hearing was held on S. 1780. See, Program Fraud Civil Penalties Act, Hearing before the Senate Committee on Governmental Affairs, 97th Congress, 2d Session (1982). And, on November 15, 1983, a hearing was held on S. 1566. See, Program Fraud Civil Penalties Act of 1983, Hearing before the Senate Committee on Governmental Affairs, 98th Congress, 1st Session (1983).

[2] Senate Report 99-212, 99th Congress, 1st Session (1985).

[3] See, Program Fraud Civil Penalties Act of 1985, Hearing before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 99th Congress, 1st Session (1985).

[4] Fraud in Government Programs:--How Extensive Is It?--How Can It Be Controlled? Report to the Congress by the Comptroller General reprinted in Program Fraud Civil Penalties Act of 1985, Hearing before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 99th Congress, 1st Session (1985), at p. 238. See also, Civil Money Penalties Law of 1981: A New Effort To Confront Fraud and Abuse in Federal Health Care Programs, by Richard P. Kusserow (Inspector General for the Department of Health and Human Services), 58 Notre Dame Law Review 985 (1983).

[5] S. 1134, Report No. 99-212, 99th Congress, 1st Session (1985).

prescribed by law, a civil penalty of not more than $10,000 for each such claim. Such person shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim, or the portion of such claim, which is determined under this chapter to be in violation of the preceding sentence.

(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a statement that the person knows or has reason to know—

(A) asserts a material fact is false, fictitious, or fraudulent; or

(B)(i) omits a material fact,

(ii) as a result of such omission, such statement is false, fictitious, or fraudulent, and

(iii) the person making, presenting, or submitting such statement has a duty to include such material fact in the statement, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $10,000 for each such statement.

The bill limits the administrative enforcement of this provision to small claims—claims of less that $100,000--under Section 803(c), and applies to all federal "authorities," including executive departments, military departments, the U.S. Postal Service, and certain "establishments."[6]

Procedurally, the administrative imposition of the penalties provided for under the bill are initiated at the agency level. The "investing official" of the agency reports the findings and conclusions concerning liability for civil penalties to a "reviewing official" in the agency. "Investigating officials" are agency officials authorized to conduct investigations pursuant to the Inspector General Act of 1978, and, in agencies not subject to that Act, certain authorized officials.[7] "Reviewing officials" are certain authorized officials, or certain specified independent officials in the Armed Forces.[8]

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[6] See, Section 801(a)(1) of the bill.

[7] See, Section 801(a)(5) of the bill.

[8] See, Section 801(a)(8) of the bill.

If the reviewing official determines on the basis of the investigating official's report that there is adequate evidence to believe that a person is liable for civil penalties, the reviewing official is to transmit a written notice to the Attorney General of the United States that the reviewing official intends to refer the allegations to a hearing examiner.[9] The Attorney General, or his designated Assistant Attorney General, may disapprove the referral within 90 days after receipt, thereby terminating the matter. If the Attorney General makes a written finding that the matter should be stayed because its continuation may adversely affect a related pending or potential civil or criminal action, the matter is stayed until resumption is authorized by the Attorney General. Otherwise, written notice is given to the person allegedly liable, who may request, and has a right to, a hearing before a hearing examiner. The hearing is to be conducted in accordance with regulations promulgated by the agency, with specified rights to counsel, discovery, cross-examination, and other procedural guarantees. The hearing examiner is to issue a written decision, including findings and determinations. An appeal from the hearing examiner to the agency head is required before the matter becomes final agency action subject to judicial review.

The determination of liability for the civil penalties under Section 802 of the bill by means of the administrative process is subject to judicial review under Section 805 of the bill. Petitions for judicial review may be filed after the administrative remedies are exhausted and within 60 days after the date on which the authority head sends the final decision to a person.[10] The petitions for review may be filed with the United States Court of Appeals

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[9] See, Section 803(a)(2) of the bill.

[10] See, Section 805(a) of the bill.

1) in the circuit in which the person resides or transacts business, 2) in the circuit in which the claim or statement upon which the determination of liability is based was made, presented, or submitted, or 3) in the District of Columbia Circuit.

The findings of fact made by the hearing examiner are final and conclusive, and may only be set aside if the decision of the hearing examiner is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if such findings are not supported by substantial evidence."[11]

As the foregoing outline of the bill indicates, the bill essentially provides for the determination of liability for civil penalties by an agency hearing examiner, subject to judicial review. You have asked that we review the bill and the appropriate legal authorities to ascertain whether or not the bill raises either Seventh Amendment or Due Process issues.

The Seventh Amendment

The Seventh Amendment provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Quite obviously, the bill does not provide for a jury trial, but provides instead for fact-finding before a hearing examiner of a federal agency. The question arises as whether such a procedure is violative of the right to a trial by jury.

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[11] See, Section 805(c) of the bill.

The leading case involving the question of whether or not administratively imposed civil penalties comply with the Seventh Amendment's right to a jury trial is Atlas Roofing, Inc. v. Occupational Safety and Health Review Commission.[12] There, the Supreme Court was presented directly with that question as the result of civil penalties imposed by the Occupational Safety and Health Review Commission pursuant to its statutory authority under the Occupation Safety and Health Act of 1970.[13]

The Supreme Court made this important observation:

> At least in cases in which "public rights" are being litigated--e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact--the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.
>
> Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred. These statutory schemes have been sustained by this Court, albeit often without express reference to the Seventh Amendment. (Footnote omitted.)[14]

In reaching its unanimous conclusion, the Supreme Court drew an important, and determinative, distinction between the civil cases brought to enforce Common Law causes of action and administrative cases brought to enforce federal statutory civil penalties:

> The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it, and

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[12] 430 U.S. 442 (1977) (Unanimous opinion, Blackmun, J., not participating.).

[13] 84 Stat. 1590 (1970), 29 U.S. Code Sections 651 et seq.

[14] Atlas Roofing, supra at 450.

> there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. We cannot conclude that the Amendment rendered Congress powerless--when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate--to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law--such as an administrative agency--in which facts are not found by juries.[15]

Thus, in Atlas Roofing the Supreme Court concluded that the Seventh Amendment right to a jury trial did not extend to administrative fact-finding proceedings involving the imposition of a civil penalty. But Atlas Roofing did not constitute a departure from prior holdings concerning administrative fact-finding. As the Court observed in Atlas Roofing, the Seventh Amendment issue had already been squarely addressed in National Labor Relations Board v. Jones & Laughlin Steel Corp.[16] in 1937. There, the Supreme Court held that Congress could properly commit fact-finding to the National Labor Relations Board--an administrative tribunal--for the purpose of deciding whether unfair labor practices had been committed and for the purpose of administratively ordering an employer to provide back pay. The NLRB Court observed:

> It is argued that the requirement [under the National Labor Relations Act for payment of certain lost wages] is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Amendment this preserves the right which existed under the common law when the Amendment was adopted... Thus, it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law... It does not apply where the proceeding is not in the nature of a suit at common law...
>
> The instant case is not a suit at common law or in the nature of such suit. The proceeding is one unknown to the common law. It is a

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[15] Atlas Roofing, supra, at 460.

[16] 301 U.S. 1 (1937).

> statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merits. (Citations omitted.)[17]

Other earlier cases are in accord. For example, as early as 1909, the Supreme Court observed in Oceanic Steam Navigation Co. v. Stranahan,[18] that "...it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking judicial power." Later, in Lloyd Sabaudo Societa Anonima Per Azioni v. Elting,[19] the Supreme Court again approved agency adjudication of violations and assessments of penalties. In Block v. Hirsh,[20] Mr. Justice Holmes, speaking for the Court, rejected a constitutional challenge based on the Seventh Amendment to a statute transferring actions to recover possession of real property from the courts to a rent control commission:

> The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the Commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.[21]

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[17] Id., at 48-49.

[18] 214 U.S. 320, 339 (1909).

[19] 287 U.S. 329 (1935).

[20] 256 U.S. 135 (1921).

[21] Id., at 158.

Nevertheless, the right to jury trials before courts for Common Law causes of action remains vital. In Pernell v. Southall Realty,[22] the Supreme Court agreed that the Seventh Amendment "would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right of possession, to an administrative agency."[23] But there, the Court found that Congress' statutory provision that actions be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction did give rise to the right of a jury trial, because the remedial proceeding was judicial.

Thus, under Atlas Roofing and related cases two key factors decide the right under the Seventh Amendment to a jury trial. The first involves the legal analysis of whether the action was in the nature of an action available at the time of the framing of the Constitution under the Common Law. And the second involves the question of whether the tribunal is judicial or administrative.

We are not aware of any pertinent decision of the Supreme Court since Atlas Roofing, supra, that would lessen in any way the meaning of the Seventh Amendment set forth in that decision. Moreover, several lower court decisions since Atlas Roofing have applied its principles consistently. For example, the District of Columbia Circuit held in Washington Star Co. v. International Typographical Union Negotiated Pension Plan,[24] that withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act[25] do not deny employers the right to trial by jury under the Seventh Amendment because the procedures of that Act are a proper exercise of congressional power to delegate fact-finding functions to administrative bodies in cases involving public rights.

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[22] 416 U.S. 363 (1974).

[23] Id., at 383.

[24] 729 F.2d 1502 (D.C. Cir. 1984).

[25] 29 U.S. Code Section 1381 et seq.

Similarly, in Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.,[26] the Second Circuit concluded that when Congress creates a new cause of action and remedies unknown at Common Law, it may vest fact finding in a tribunal other than a jury, without running afoul of the Seventh Amendment.[27]

The case law under the Seventh Amendment is sufficiently well settled so that it may be asserted with some confidence that Congress may provide for statutory causes of action not available at Common Law, vest fact-finding for such causes of action in administrative tribunals, and not violate the Seventh Amendment.

Both the civil penalty provision and the double claim assessment provision of S. 1134, as reported, appear to fall within the permissible constitutional powers of Congress. Both provisions establish remedies not available at Common Law, and both provisions involve the determination of fact by an administrative tribunal, in the form of a federal agency hearing examiner. For these reasons, it would appear that the civil penalty and assessment provisions of S. 1134 do not violate the right to a jury trial under the Seventh Amendment.[28]

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[26] 725 F.2d 843 (2d Cir. 1984), cert. denied 104 S. Ct. 3554, 82 L.Ed.2d 856.

[27] See also, Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1124 (1st Cir. 1984), on rehearing 762 F. 2d 1137 (1st Cir. 1984); and, A. Soloff & Son, Inc. v. Asher, 604 F. Supp. 787 (D.C.N.Y. 1985).

[28] We note that the Report of the Committee on Governmental Affairs on S. 1134, supra, sets forth a legal analysis of the Seventh Amendment at pp. 31-32 that is in accord with the foregoing.

Due Process of Law

We turn, now, to the second aspect of your inquiry--the question of whether the administrative imposition of civil penalties violates the Due Process Clause of the Fifth Amendment. The concept of Due Process of law under the Fifth Amendment embraces a broad range of procedural and substantive requirements intended to preserve "those canons of decency and fairness which express the notions of justice of English-speaking peoples."[29] This fundamental fairness has been said to be derived "not alone...from the specifics of the Constitution, but also...from concepts which are part of the Anglo-American legal heritage."[30]

Notice and hearing are fundamental to due process in civil proceedings.[31] Nevertheless, the Supreme Court has held that the demands of due process do not require a hearing at the initial stage, or any particular point in the proceeding, so long as a hearing is held before an agency's decision becomes final.[32] Moreover, the Court has specifically held that "due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining facts upon which the imposition of...a fine depends."[33]

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[29] Rochin v. California, 342 U.S. 165, 169 (1952) (Justice Frankfurter for the Court).

[30] Sniadach v. Family Finance Corp., 395 U.S. 337, 342-343 (1969) (Justice Harlan concurring).

[31] Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915).

[32] Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941). Congress has been sustained in providing for judicial review after regulations have become effective during a war emergency in the face of due process challenges. See, Bowles v. Willingham, 321 U.S. 503 (1944).

As reported, S. 1134 provides for written notice and a hearing on the record,[34] despite the fact that these formalities may not be required to this extent by due process.[35] In addition, S. 1134 allows for extensive rights of discovery and cross-examination beyond the minimum due process requirements.

Other aspects of due process also appear to be met by the provisions of the bill. For example, one question that has been raised relates to the neutrality of administrative officials. It is fundamental that when the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets the currently prevailing standards of impartiality.[36] But, in Marshall v. Jerrico, Inc.,[37] the Supreme Court distinguished administrative proceedings from judicial proceedings and held that the return of the administratively assessed civil penalties to the Employment Standards Administration of the Department of Labor in reimbursement for the costs of determining violations and assessing the penalties did not violate the Due Process Clause of the Fifth Amendment. Thus, the strict requirements of neutrality of officials performing judicial or quasi-judicial functions[38] under the Due Process Clause are not applicable to administrative enforcement of civil penalties.

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[33] Lloyd Sabaudo Societa Anonima Per Azioni, supra.

[34] Section 803(e) of the bill.

[35] For example, in some instance the "hearing" requirement of due process can be met simply through the notice and comment process of the Administrative Procedures Act, 5 U.S. Code Section 553. See, United States v. Florida East Coast Railroad, 410 U.S. 224 (1973). On several occasions, the Supreme Court has reaffirmed its view that administrative hearings do not have to follow the judicial model. See, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); and, Mathews v. Eldridge, 424 U.S. 319 (1976).

[36] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[37] 446 U.S. 238 (1980).

Finally, a brief word might be mentioned concerning the question of whether or not the civil penalty of up to $10,000, plus the assessment in lieu of damages of twice the amount of the claim as provided under S. 1134 might be viewed as "penal" rather than civil--thereby raising consitutional protections attached to criminal proceedings under the Fifth Amendment Due Process Clause and the Sixth Amendment. The Supreme Court in Helvering v. Mitchell,[39] held that remedial sanctions in the form of forfeiture of goods, payment of fixed or variable sums are valid civil sanctions, and not criminal sanctions despite their severity, that have been used by the federal government since the original revenue law of 1789. With specific regard to false claims against the United States, the Supreme Court in United States ex rel. Marcus v. Hess,[40] upheld the False Claims Act as constitutional and gave specific approval to the double damages and forfeiture provisions of that legislation as a constitutionally valid remedial statute imposing a civil sanction. And, the more recent decision in United States v. Bornstein,[41] lends further authority to the valid imposition of the double assessment in lieu of damages provision contained in S. 1134.

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[38] See, Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village of Monroeville, 409 U.S. 57 (1972); and, Carey v. Piphus, 435 U.S. 247 (1978).

[39] 303 U.S. 391 (1938).

[40] 317 U.S. 537 (1943).

[41] 423 U.S. 303 (1976).

For all these reasons, it would appear that the procedures set forth for the administrative hearing under S. 1134 do not raise significant constitutional impediments under the Due Process Clause of the Fifth Amendment.

Conclusion

The statutory authority for the administrative imposition of civil penalties is common to the organic authority of many federal agencies. In 1972 --prior to the Supreme Court's decision in Atlas Roofing--the Administrative Conference of the United States published a thorough review and analysis of the use of civil money penalties by federal agencies at that time, and documented an extensive history and use of the effectiveness of the penalties.[42]

The Congress, itself, is aware of the extensive use of civil penalties as an extremely important method of enforcement of federal law--including the enforcement of agency rules and regulations. For example, the House Committee on Government Operations recently held an oversight hearing[43] concerning the enforcement of civil penalties against coal mine operators for violations of mining standards established under the Surface Mining Control and Reclamation Act of 1977. [44]

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[42] Report in Support of Recommendation 72-6--An Evaluation of the Present and Potential use of Civil Money Penalties as a Sanction by Federal Administrative Agencies, by Harvey J. Goldschmid, 2 Recommendations and Reports of the Administrative Conference of the United States 896 (1972).

[43] Review of the Department of the Interior's Civil Penalty Program, Hearing before a Subcommittee of the House Committee on Government Operations, 99th Congress, 1st Session (1985).

[44] 30 U.S. Code Section 1201 et seq.

While there may be important public policy considerations relating to the imposition of civil penalties by administrative agencies, it appears that the widespread use of civil penalties and the constitutionality of the various aspects of their administrative imposition are now well established.

We trust that the foregoing has been responsive to your inquiry.

Robert D. Poling
Specialist in American Public Law
American Law Division

Senator COHEN. The second issue I will touch upon just briefly is the due process protections afforded to people who are alleged to be liable.

Mr. Chairman, the Government Affairs Committee has crafted an administrative proceeding that I think provides elaborate due process protections. As Professor Bruff has noted: "S. 1134 not only passes due process scrutiny, it goes as far as to protect those charged with fraud as is possible without impairing the Government's efforts to obtain remedies that will protect the public."

I think it has already been outlined to you the very serious steps that we have laid out in the bill that would ensure due process protection. First, you have to have the agency investigating official, who is usually the inspector general, conduct the initial investigation. The IG's findings then have to be considered by the agency's reviewing official, who independently evaluates the allegations to determine whether or not there is adequate evidence to believe that a false claim or statement has been made. If that reviewing official believes there is adequate evidence, the matter has to be referred to the Justice Department for yet another review before the agency is allowed to proceed any further.

Then, once at the hearing stage, the hearing examiner who is presiding is an administrative law judge, who is independent of the agency. The hearing itself is conducted pursuant to all of the Administrative Procedure Act requirements and then, as you have heard before, we have a judicial review provision as well.

It is worth nothing that the Supreme Court has upheld laws that provide far less elaborate due process protections than we afford in this bill.

Taken together, Mr. Chairman, I think the checks and balances inherent in the legislation are more than adequate to insure due process in a fair proceeding against individuals alleged to have defrauded the Government.

This bill is long overdue, and this end, we have worked very closely with Senator Hatch's staff. He has raised a number of questions. I believe we are well on the road to answering any objections that he has, and I want to commend him and his staff for taking the time to work with my staff and I to iron out any difficulties that he might have with the legislation.

Senator HATCH. I want to thank the distinguished Senator for the efforts that are being made to work this out. I think that they really are not only good faith, I think they have been pretty fruitful so far, from what little I know about it.

Excuse me, Mr. Chairman, I did not mean to interrupt.

The CHAIRMAN. Senator, we want to thank you very much for your presence. You make a very impressive case. I am still disturbed over not giving a jury trial to people who, say, are guilty of fraud because they could be prosecuted for criminal violations.

So we will have to think about this, but thank you so much for coming.

Senator Grassley, do you have any questions?

Senator GRASSLEY. I am a cosponsor of your bill, Senator Cohen, and I want to thank you for your testimony and I want to thank Senator Levin as well.

Senator COHEN. Well, we have tried to build upon the false claims legislation which you have been very actively involved with, and we have patterned much of this based upon that which is already a matter of law.

Senator HATCH. Let me just add one other thing. There is some concern about the *Northern Pipeline* case. There is no question that under that case, there is a difference between public rights and private rights.

The problem here that may be created—and I have to study it a little bit more to see if there really is a problem, maybe some of the subsequent witnesses can help me on this—the problem here is that, of course, even with Northern Pipeline in place, this bill provides an administrative proceeding and a right to appeal and go through the court process, so literally there is not court-stripping except for one possible question and that is this:

As I understand it, unless the circuit court finds that the administrative law judge, as the finder of the facts, does not meet a certain standard that of substantial evidence to support the findings, then the courts cannot overrule him. So the courts are not going to have this case de novo.

Senator COHEN. That is a test of all the cases under the APA law itself.

Senator HATCH. It may be stripping in the eyes of some if the courts do not have a right to hear the case de novo and are bound by the factual findings of the administrative law judge.

Senator COHEN. As I recall, there is substantial evidence test in the APA, and the court would have to find that there is not substantial evidence to support the administrative law judge's decision.

Senator HATCH. Under your bill that is true, but——

Senator COHEN. Under the Administrative Procedure Act it is also true.

Senator HATCH. OK.

Senator COHEN. Mr. Chairman, I would just point out that what we are trying to do is deal with individuals and companies who submit false, fictitious, or fraudulent claims or statements which are currently not being litigated because the dollar amount is too low. I know of your concern in this area, and it seems to me we have tried to take those concerns into acount by fashioning a remedy for the Government that still protects the due process rights of the individuals.

The CHAIRMAN. We certainly want to try to collect all these claims that are due and punish these people who make fraudulent statements. It does concern me that we not abrogate the private right of trial by jury, though, and we have to look into that further.

Thank you so much for coming.

Senator HATCH. Just one other thing. One thing that bothers a lot of people, Bill, and it bothers me, too, is that—and, as you know, I raised the issue of 10(b)(5) under the securities laws where a person is branded as a defrauder even though what it means is they made an error or omission for the most part in a registration statement, so they go through life as somebody who has committed fraud under rules that really provide for almost automatic finding of fault, really oppressive rules in my opinion in some ways as the courts have interpreted them.

In this particular case, this is a little bit different from other administrative law actions, and that is you are actually allowing an administrative judge to make a finding of civil fraud which that contractor or whoever it may be, is going to have to carry through the rest of his life.

Senator COHEN. We do that now, Senator Hatch, under the Civil Monetary Penalties Law.

Senator HATCH. I understand, but that does not necessarily make it right or advisable. You see, that is the problem, and that is something that I am trying to resolve. However, I think you are working with us, we are doing whatever we can here and I am intrigued with what we have agreed to so far.

Senator COHEN. But if we were to require that fraudulent statements or fictitious claims must be prosecuted under a criminal statute, they would never be prosecuted. If you look at the backlog of cases——

Senator HATCH. I understand that argument, too.

Senator COHEN [continuing]. They would never be prosecuted. What we are talking about is, if you are going to come to the Government and ask for Government contracts or benefits, then you have got to deal honestly and not act in gross negligence or with reckless disregard when submitting claims to the Government.

It seems to me that when you are coming to the taxpayer and asking for some benefit or relief, you have got to deal honestly with us.

The CHAIRMAN. Senator, you do a great job on Armed Services and you are an able lawyer and we are honored to have you before us.

Senator COHEN. Thank you very much.

[The prepared statement of Senator Cohen follows:]

PREPARED STATEMENT OF SENATOR WILLIAM S. COHEN

Mr. Chairman, I appreciate the opportunity to testify this morning on a problem which we, in the Governmental Affairs Committee, have devoted considerable time and attention to -- fraud in federal programs.

As you know, Senators Levin and I, along with fourteen other Senators, have sponsored legislation, the Program Fraud Civil Remedies Act, that we believe goes a long way toward solving this problem. I am pleased to note that four distinguished members of the Judiciary Committee, Senators Grassley, DeConcini, Kennedy and Leahy, are among the cosponsors.

Briefly, the Program Fraud bill provides agencies with an administrative remedy for false claim and false statement cases under $100,000 which the Justice Department has declined to litigate.

I think it is important to emphasize at the outset, Mr. Chairman, that S. 1134 would not create a new category of offenses. Rather, it simply establishes an administrative alternative, patterned largely after the civil False Claims Act, that would capture only that conduct already prohibited by current law. In other words, Mr. Chairman, S. 1134 merely establishes a new remedy for old wrongs.

The provisions of the bill, moreover, are consistent with those amendments to the False Claims Act reported unanimously by the Judiciary Committee last December.

Judicial remedies are available to penalize and deter fraud. For small-dollar cases, however, the cost of litigation often exceeds the amount recovered, thus making it economically impractical for the Justice Department to go to court. The government is frequently left without an adequate remedy for many small-dollar cases.

The consequence, according to the Justice Department, is that the federal government loses "tens, if not hundreds, of millions of dollars" to fraud each year. Beyond the actual monetary loss, fraud in federal programs also erodes public confidence in the administration of these programs by allowing ineligible persons to benefit from them.

Since 1981, the Governmental Affairs Committee has worked diligently to fashion a solution to this problem that is both effective and fair. The Program Fraud Civil Remedies Act, which marks the culmination of that effort, would capture those small-dollar fraud cases that now fall through the cracks of our judicial system. Last November, after careful consideration, the Committee reported S. 1134 with only one dissenting vote.

The bill also is strongly supported by the major players in the fight against fraud -- the Justice Department, the General Accounting Office, and the Inspectors General -- as well as the Administrative Conference of the United States, the Federal Bar Association, and, most recently, the Packard Commission.

Despite this overwhelming support for the Program Fraud bill, we, unfortunately, have been blocked from bringing this legislation to the floor. With each passing day, the federal government loses more money and public confidence in its programs because of the failure of this bill to be approved.

The benefits of establishing an administrative remedy, as provided in S. 1134, are numerous. First, it would allow the government to recover money that, up until now, has been irretrievably lost to fraud. Second, it would provide a more expeditious and less expensive procedure to recoup losses, compared with the extensive investments of time and resources required to litigate in federal court. Finally, such an administrative remedy would serve as a deterrent against future fraud by dispelling the perception that small-dollar frauds against the government may be committed with impunity.

An additional benefit is that we already know such a remedy can work. Under the Civil Monetary Penalties Law (CMPL), the Department of Health and Human Services is authorized to impose penalties and assessments administratively against health-care providers who knowingly or with reason to know submit false claims for services. Since implementation of the CMPL, HHS has been able to recover over $22 million resulting from 175 settlements and litigated cases.

Nor is the HHS law the only statute of its kind. Indeed, approximately 200 statutes already authorize the administrative imposition of civil penalties. It should be abundantly clear, therefore, that the administrative proceeding we've proposed in S. 1134 is by no means novel.

Mr. Chairman, in the interest of time, I would like to turn now to what I understand to be the Committee's chief interests: the constitutionality of S. 1134, the adequacy of the due process protections, and the grant of testimonial subpoena power to the Inspectors General.

CONSTITUTIONALITY

I asked several distinguished constitutional scholars for their opinions on S. 1134. They were unanimous in their view that the bill easily passed constitutional muster. As Professor Harold Bruff of the University of Texas stated: "No serious constitutional question attends this bill." The American Law Division of the Congressional Research Service echoed Professor Bruff's conclusion, stating: "the [Program Fraud] bill does not raise constitutional issues."

Some critics of the legislation have asserted that establishing an administrative remedy for small-dollar frauds violates a person's Seventh Amendment right to a jury trial. The Supreme Court, however, unanimously rejected this constitutional challenge in Atlas Roofing Co. v. Occupational Safety and Health Administration, upholding a civil penalty scheme with the same essential features as the Program Fraud bill. The Court noted in Atlas Roofing that:

> Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.

Another constitutional challenge, which I find even less convincing, is the contention that S. 1134 "thoroughly strips the court of jurisdictional authority." That simply is not true. According to Joseph Kennedy, Chairman of the Committee on Administrative Judiciary of the Federal Bar Association:

> The fact that the administrative remedy is subject to oversight by the Article III courts under the provision for judicial review ensures the constitutionality of S. 1134. For it has long been recognized that so long as the essential attributes of judicial power such as review of agency findings and enforcement of agency orders remain in the Article III courts there is no constitutional impediment to the power of Congress to vest initial adjudication of such rights in Article I courts and administrative agencies.

Furthermore, nothing in the bill precludes the Justice Department from litigating any false claim or false statement case, whether it involves $99,000 or two dollars.

Those few critics who characterize S. 1134 as a "court-stripping" bill point to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. for support. In the Marathon decision, as you know, the Court held unconstitutional the provisions of the Bankruptcy Reform Act of 1978 that granted to bankruptcy judges, who are Article I judges, jurisdiction over all civil proceedings arising under the bankruptcy laws of the United States. The Court held that suits involving private rights, in this case, breach of contract, are solely within the jurisdiction of Article III courts.

Marathon clearly does not apply to Program Fraud proceedings for the simple reason that it deals with the enforcement of private rights. S. 1134 establishes an administrative remedy to deal with public rights, that is, suits between the government and others.

Mr. Chairman, I would like to include in the hearing record a copy of the Justice Department's testimony before my Governmental Affairs Subcommittee citing the Atlas Roofing case in support of the Program Fraud bill's constitutionality, as well as letters from the Administrative Conference, the Federal Bar, the American Law Division of the Congressional Research Service, and several constitutional scholars in support of the bill's constitutionality.

DUE PROCESS

The second issue I'd like to discuss is the due process protections afforded to persons alleged to be liable. Mr. Chairman, the Governmental Affairs Committee has crafted an administrative proceeding that, in my judgment and in the judgment of administrative law experts, provides elaborate due process protections for individuals subject to a program fraud proceeding. As Professor Bruff noted:

> S. 1134 not only passes due process scrutiny; ...it goes as far to protect those charged with fraud as is possible without impairing the government's efforts to obtain remedies that will protect the public.

Under the bill, allegations of wrongdoing are first investigated by the agency's "investigating official," usually the Inspector General. The IG's findings then are considered by the agency's "reviewing official," who independently evaluates the allegations to determine whether or not there is adequate evidence to believe that a false claim or statement has been made. If the reviewing official believes there is adequate evidence to proceed, the matter is referred to the Justice Department for yet another review before the agency is allowed to proceed any further.

An agency may only then go forward with a hearing if the Attorney General approves it or, within 90 days, takes no action to disapprove it. The Attorney General also has the right to block agency action if, for example, he believes that the case lacks prosecutive merit. Once at the hearing stage, the "hearing examiner" presiding is an Administrative Law Judge who, given the procedures for ALJ selection, evaluation, and removal, is independent of the agency.

The hearing itself would be conducted pursuant to the due process safeguards of the Administrative Procedure Act, which entitles the person to a written notice of the allegations, the right to be represented by counsel, and the right to present evidence on his or her own behalf. The bill even goes beyond these APA protections by granting the person limited discovery rights and by providing a more complete notice than is required under the APA.

Finally, the person alleged to be liable has the right to appeal the hearing examiner's decision to the agency head and then, having exhausted all administrative remedies, the right to obtain judicial review in a U.S. Court of Appeals.

It is worth noting that the Supreme Court has upheld laws that provide far less elaborate due process protections than are afforded by S. 1134. The Court has repeatedly rejected the notion that administrative hearings must adhere to the judicial model of due process, stating in Mathews v. Eldridge, for example, that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."

Taken together, Mr. Chairman, the checks and balances inherent in the program fraud proceeding, the due process protections adopted from the Administrative Procedure Act, and the use of Administrative Law Judges as hearing examiners provide more than sufficient insulation between actors to ensure fair and impartial determinations.

TESTIMONIAL SUBPOENA POWER

The third issue I'd like to discuss concerns the need for testimonial subpoena authority. S. 1134 authorizes the Inspectors General under limited circumstances to require by subpoena the attendance and testimony of witnesses. I believe, as do the Inspectors General, that this authority would be an essential tool in helping the government prove the elements required under the bill to establish liability, since few who defraud the government leave a sufficient "paper trail" to enable proof of fraud by documents alone.

Concerns have been raised, primarily by some defense industry representatives, that this testimonial subpoena authority is "unfettered" and "unprecedented." Neither is the case.

Under S. 1134, an Inspector General may only subpoena a witness when the subpoena is necessary to the investigation. The bill was amended in Committee to provide other significant limitations to safeguard against abuse. First, the Justice Department is given veto authority over its use. S. 1134 requires that the investigating official, prior to issuing a subpoena, must first notify the Attorney General, who then has 45 days within which to disapprove the subpoena. Second, S. 1134 limits the use of this authority only to the 18 statutory Inspectors General, appointed by the President and confirmed by the Senate; the IGs may not delegate this authority.

In addition to these safeguards, S. 1134 provides significant due process protections for those individuals subpoenaed by a Inspector General. These protections include the right to be accompanied, represented, and advised by an attorney. The bill also specifies that the testimony is to be taken in the judicial district in which the subpoenaed person resides or transacts business, and the person would be paid the same fees and mileage paid to witnesses in U.S. district court.

Moreover, there is ample precedent for granting investigatory testimonial subpoena authority to executive departments and regulatory agencies. The American Law Division of the Congressional Research Service compiled a list of more than 65 statutes that provide such authority, ranging from the broad power granted to the Department of Health and Human Services for investigations of claims for Social Security retirement and disability benefits to the authority given to the Department of Agriculture for investigations under the Horse Protection Act.

These are only a few of the panoply of issues carefully considered by our Committee. The standard of knowledge and the burden of proof in S. 1134, for example, were subject to particularly close scrutiny. I am pleased that the Judiciary Committee adopted virtually identical standards in its amendments to the civil False Claims Act. As you know, the knowledge and burden of proof standards adopted by our two Committees are strongly supported by the Justice Department.

Mr. Chairman, the enactment of an administrative remedy for small-dollar fraud cases is long overdue. The fact that the Justice Department declines prosecution in most cases where the government does not sustain a significant monetary loss is an open invitation to those individuals tempted to defraud the federal government. Until federal agencies are given the power to bring administrative proceedings in such cases, these small-dollar frauds will continue unabated. The Program Fraud Civil Remedies Act will help combat fraud without compromising the rights of individuals accused of wrongdoing.

We look forward to working with you and your colleagues to enact this bill this year.

The **Chairman**. I am now going to turn the hearing over to the distinguished Senator from Utah, who is one of the ablest lawyers in the Congress. I have got to go back to Armed Services.

Judge Sneeden, we are very pleased to have you here and I am going to make it a point to read your statement because I have so much confidence in what you have to say.

Senator Hatch, if you will now take over.

Senator **Hatch** [presiding]. Thank you, Mr. Chairman.

Let us now call Hon. Richard Kusserow, who is the inspector general for Health and Human Services.

We are happy to have you here.

STATEMENT OF RICHARD P. KUSSEROW, INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY THOMAS S. CRANE, COUNSEL

Mr. **Kusserow**. Thank you, Mr. Chairman.

Senator **Hatch**. We are going to limit all witnesses from here on to 5 minutes each. That is the only time I have left. I have to be to a very important meeting for my State at 12 noon over on the House side, so I do not have much choice other than do that.

Mr. Kusserow, we will turn the time over to you.

Mr. **Kusserow**. Thank you, Mr. Chairman. I brought with me today Thomas S. Crane, of our general counsel's staff, involved in prosecuting the civil monetary penalties authorities we have in our department. I will in fact abbreviate my statement and, with your permission, submit it in its entirety for the record.

Senator **Hatch**. Without objection, we will put all statements in the record as though fully delivered.

Mr. **Kusserow**. In June of last year, I testified before the Senate Governmental Affairs Committee on S. 1134, the Program Fraud and Civil Penalties Act of 1985. At that time I voiced our strong support for a Governmentwide authority to impose civil administrative penalties against individuals or entities who defraud the Federal Government.

In addition, on behalf of the President's Council on Integrity and Efficiency, I communicated the unanimous endorsement of the entire community of statutory and inspector general to such a streamlined authority.

As you know, since 1981, the Department of Health and Human Services has enjoyed statutory authority to impose civil monetary penalties and assessments against those who file false or otherwise improper claims for payment in the Medicare, Medicaid, and Maternal and Health Programs.

The first civil monetary penalty statute can serve as a prototype, I believe, for possible Governmentwide application. Through the combined efforts of various components of our department, the Office of Inspector General, the Office of General Counsel, the Grants Appeals Board, and the Office of the Under Secretary, the program to date has proved to be a highly useful tool in sanctioning wrongdoers and recouping for the Medicare Trust Funds and general revenue accounts, those unjust enrichments acquired through false and fraudulent claims.

Furthermore, evidence suggests that our program is having a significant effect in deterring fraudulent and abusive conduct in our programs. In addition, the manner by which we operate the program provides a great deal of flexibility in coordinating our activities with the Department of Justice

In this regard, I am pleased to inform the committee that the department, with the positive support and assistance of the Department of Justice, has successfully negotiated and imposed penalties and assessments on an average of about $1 million a month since implementation of the program.

What I think is also very significant, Mr. Chairman, is that of the 186 total cases in which action has been completed, 170 cases were settled prior to issuance of any demand letter. We had 16 cases where demand letters have been issued, 1 where the respondent defaulted, and 9 cases settled after receipt of the demand letter and prior to a hearing, but only 6 cases where we actually had to go to a hearing stage.

Another 23 cases, involving an estimated $2.3 million, has been retained by the Civil Division of the Department of Justice for possible recovery under the False Claims Act.

The above information I think is noteworthy for three reasons: First and foremost, it demonstrates the success of the program in dollars and cents; second, the table that we have submitted as part of our formal testimony illustrates that the cases are in fact settled prior to going into a formal administrative proceeding; and, third, the process avoids overloading the burdens of the Department of Justice.

Given the record of the civil monetary program at HHS, it is really not surprising that we are strong advocates for extension of similar authority to other programs administered by our department as well as Governmentwide.

For too long, many providers of goods and services to the Government have been playing the game catch me if you can, knowing full well that even if caught, the overburdened court docket minimized their chance of being prosecuted and penalizied. We are convinced that an effective administrative authority is sorely needed alternative to this overloaded Federal court system, and we are convinced that such Governmentwide authority modeled along the lines of our prototype would provide a significant Governmentwide deterrent to those who would defraud State and Federal Government programs.

We would like to address two important issues pertaining to the legislation. One is the standard of knowledge necessary for the imposition of penalties and assessments. The second is the testimonial and subpoena power for investigating officials.

With respect to the knowledge standard, the Congress has an opportunity to enact a landmark piece of legislation, namely to authorize the Government to impose civil monetary penalties and assessments when an individual doing business with the Government submits claims or statements that he knows or should have reason to know are false. In doing so, Congress would state that claimants for public funds have an affirmative duty to ascertain the true and accurate basis for their claims on which the Government is asked to rely. The duty should encompass both factual basis of claims as well as their legal basis, that is, statutory, regulatory or contractual basis. However, their duty should be limited to what is reasonable and prudent under the circumstances.

The second issue of particular concern to the IG's is the testimonial and subpoena power for investigating officials. There really are two major reasons why we think it is essential to have that ability to compel testimony.

We feel that successful fraud investigations really require that when certain representations are made and those representations are false, then the person making the representation has actual or constructive knowledge of the falsity. Typically, the people that are in the best position to provide that kind of information are under the supervision or direction of the entity for which the claims were made. They may be billing clerks or, in the case of our department, nurses or other people that work for a physician. Often they are reluctant to come forward without being protected against retribution by their employer. Therefore providing that kind of protection for witnesses is essential to the process.

If we do not have the testimonial or subpoena, authority then, as we have encountered in many, many cases in our own department's program, there will be had many cases where we will not be able to take any action because of the fact that the witnesses would not come forward or they are operating under instructions from their superiors not to cooperate with the Government.

Let me move, Mr. Chairman, quickly to the conclusion that we want to emphasize, that is, our support for the extension of this authority Governmentwide. We think that the model program of our department has demonstrated that civil money penalties can be an effective tool. We also have demonstrated that by setting up very flexible and reasonable ground rules and effective due process for those individuals involved in the civil monetary penalty programs, we can see that unjust enrichment is returned to the Government. And in most cases this can be done without requiring a formal hearing, let alone having it go into the courts.

Thank you.

[The prepared statement of Mr. Kusserow follows:]

PREPARED STATEMENT OF RICHARD P. KUSSEROW

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM RICHARD P. KUSSEROW, INSPECTOR GENERAL OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES. I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU THIS MORNING TO PROVIDE YOU WITH AN OVERVIEW OF OUR CIVIL MONETARY PENALTIES PROGRAM (CMP) ESTABLISHED UNDER P.L. 97-35.

IN JUNE OF LAST YEAR, I TESTIFIED BEFORE THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE ON THE BILL, S. 1134, THE "PROGRAM FRAUD AND CIVIL PENALTIES ACT OF 1985." AT THAT TIME I VOICED MY STRONG SUPPORT FOR GOVERNMENT-WIDE AUTHORITY TO IMPOSE ADMINISTRATIVE CIVIL PENALTIES AGAINST INDIVIDUALS OR ENTITIES WHO DEFRAUD THE FEDERAL GOVERNMENT. IN ADDITION, ON BEHALF OF THE PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY, I COMMUNICATED THE UNANIMOUS ENDORSEMENT OF ENTIRE STATUTORY INSPECTORS GENERAL (IG) COMMUNITY FOR SUCH AUTHORITY. OUR SUPPORT CONTINUES, MR. CHAIRMAN. AS THE FEDERAL OFFICIALS CHARGED WITH THE RESPONSIBILITY FOR PREVENTING AND DETECTING FRAUD AND ABUSE IN OUR RESPECTIVE AGENCIES, THE IGS FIRMLY BELIEVE THAT CIVIL MONETARY PENALTIES AUTHORITY WILL PROVIDE A CRITICAL TOOL IN THE ONGOING EFFORTS TO COMBAT FRAUD AGAINST THE UNITED STATES.

AS YOU KNOW, SINCE 1981, THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) HAS ENJOYED STATUTORY AUTHORITY TO EXERCISE CIVIL MONETARY PENALTY AUTHORITY AND THEREBY LEVEL ADMINISTRATIVE ASSESSMENTS AND PENALTIES AGAINST THOSE WHO FILE FALSE OR OTHERWISE IMPROPER CLAIMS FOR PAYMENT IN THE MEDICARE, MEDICAID AND MATERNAL AND CHILD HEALTH PROGRAMS. THIS FIRST CIVIL MONETARY PENALTY STATUTE CAN SERVE AS A PROTOTYPE FOR POSSIBLE GOVERNMENT-WIDE APPLICATION. THROUGH THE COMBINED EFFORTS OF THE VARIOUS COMPONENTS OF THE

DEPARTMENT - THE OFFICE OF INSPECTOR GENERAL, THE OFFICE OF THE GENERAL COUNSEL, THE GRANT APPEALS BOARD, AND THE OFFICE OF THE UNDER SECRETARY - THE PROGRAM, TO DATE, HAS PROVED TO BE A HIGHLY USEFUL TOOL IN SANCTIONING WRONGDOERS AND RECOUPING FOR THE HEALTH TRUST FUNDS AND GENERAL REVENUE, THOSE UNJUST ENRICHMENTS ACQUIRED THROUGH FALSE OR FRAUDULENT CLAIMS. FURTHERMORE, EVIDENCE SUGGESTS THAT OUR PROGRAM IS HAVING A SIGNIFICANT EFFORT ON DETERRING FRAUDULENT AND ABUSIVE CONDUCT IN OUR PROGRAMS.

THE MOST TANGIBLE INDICATION OF THE SUCCESS OF THIS PROGRAM IS THE MONEY RECOVERED FROM FRAUDULENT HEALTH CARE PROVIDERS. IN THIS REGARD, I AM PLEASED TO INFORM THE SUBCOMMITTEE THAT THE DEPARTMENT, WITH THE POSITIVE SUPPORT AND COOPERATION OF THE DEPARTMENT OF JUSTICE, SUCCESSFULLY NEGOTIATED AND/OR IMPOSED PENALTIES AND ASSESSMENTS OF AN AVERAGE OF NEARLY $1 MILLION PER MONTH SINCE THE IMPLEMENTATION OF THE PROGRAM. THE FOLLOWING TABLE ITEMIZES AND INDICATES THE STAGES OF THE PROCEEDING AT WHICH THE PENALTIES OR SETTLEMENTS WERE RECOVERED OR OBLIGATED.

186: TOTAL CASES IN WHICH ACTION HAS BEEN COMPLETED	
170 CASES: SETTLED PRIOR TO ISSUANCE OF DEMAND LETTER	$17,971,224.73
16 CASES: DEMAND LETTERS ISSUED	
1 CASE: RESPONDENT DEFAULTED	468,524.00
9 CASES: SETTLED AFTER RECEIPT OF DEMAND LETTER AND PRIOR TO HEARING	425,725.00
6 CASES: WHERE HEARING IS COMPLETED	2,238,072.86
TOTAL	$21,213,635.10

IN ADDITION, ANOTHER 23 CASES INVOLVING AN ESTIMATED $2.3 MILLION HAVE BEEN RETAINED BY THE CIVIL DIVISION OF THE DEPARTMENT OF JUSTICE FOR POSSIBLE RECOVERY UNDER THE FALSE CLAIMS ACT.

THE ABOVE TABLE IS NOTEWORTHY FOR TWO REASONS. FIRST AND FOREMOST, IT DEMONSTRATES THE SUCCESS OF THE PROGRAM IN DOLLARS AND CENTS. SECOND, THE TABLE ILLUSTRATES THAT THE VAST MAJORITY OF CASES HAVE BEEN SETTLED PRIOR TO A HEARING, THEREBY MINIMIZING ADMINISTRATIVE COSTS.

I WOULD ALSO LIKE TO POINT OUT THAT THE DEPARTMENT HAS PREVAILED IN THOSE SIX CASES THAT HAVE BEEN ADMINISTRATIVELY ADJUDICATED BEFORE AN ADMINISTRATIVE LAW JUDGE WITH APPROPRIATE DUE PROCESS RIGHTS AND PRIVILEGES. THE FOLLOWING CASES ARE ILLUSTRATIVE OF THE KINDS OF FRAUDULENT CONDUCT THAT MAY BE SUCCESSFULLY SANCTIONED UNDER OUR CMPL AUTHORITY:

- A CHIROPRACTOR WHO OWNED AND OPERATED A CLINIC IN FLORIDA, ENGAGED IN A LARGE SCALE SCHEME TO DEFRAUD THE MEDICARE PROGRAM BY FALSELY REPRESENTING INELIGIBLE CHIROPRACTIC SERVICES AS REIMBURSABLE MEDICAL SERVICES. IN EXECUTING THIS SCHEME, THAT SPANNED SEVERAL YEARS AND INVOLVED THOUSANDS OF CLAIMS, THE CHIROPRACTOR BILLED FOR UNALLOWABLE SERVICES UNDER THE NAMES OF PHYSICIANS WHO NOT ONLY NEVER PERFORMED THE SERVICES IN QUESTION, BUT WERE NO LONGER EMPLOYED BY THE CLINIC AT THE TIME THE SERVICES WERE RENDERED. THE ADMINISTRATIVE LAW JUDGE HANDED DOWN A DECISION AWARDING THE DEPARTMENT NEARLY $1.8 MILLION IN PENALTIES AND ASSESSMENTS AGAINST THE CHIROPRACTOR.

- THE DEPARTMENT WAS ALSO AWARDED $156,136 IN PENALTIES AND ASSESSMENTS AGAINST A KANSAS NURSING HOME OPERATOR WHO HAD INCLUDED NUMEROUS FALSE ITEMS IN HIS COST REPORTS. THE OPERATOR CREATED FALSE INVOICES TO SUPPORT FICTITIOUS ENTRIES IN THE REPORTS. THERE HAD BEEN A SUCCESSFUL CRIMINAL PROSECUTION IN THIS CASE; HOWEVER, WITHOUT CMPL, MUCH OF THE UNJUST ENRICHMENT WOULDN'T HAVE BEEN RECOUPED.

- A TEXAS DOCTOR, WHO CONTROLLED A HOSPITAL, BILLED MEDICARE FOR DAYS WHERE HE DID NOT VISIT PARTICULAR PATIENTS AND FOR PATIENT VISITS BY HIS DAUGHTER, WHO WAS NOT LICENSED TO PRACTICE IN TEXAS. THE DEPARTMENT WAS AWARDED $106,000 IN PENALTIES AND ASSESSMENTS. I WOULD LIKE TO POINT OUT THAT THE U.S. ATTORNEY DEFERRED CRIMINAL PROSECUTION IN FAVOR OF PROCEEDING ADMINISTRATIVELY UNDER CMPL.

- THE DEPARTMENT ALSO RECEIVED $83,776 FROM A CALIFORNIA PSYCHOLOGIST, WHO HAD FILED CLAIMS FOR 50-MINUTE INDIVIDUAL THERAPY SESSIONS FOR LARGE NUMBER OF PATIENTS. IN FACT, HE HAD RENDERED EITHER SESSIONS OF MUCH SHORTER DURATION OR GROUP THERAPY SESSIONS, BOTH OF WHICH ARE REIMBURSED AT A MUCH LOWER RATE PER PATIENT. THE PSYCHOLOGIST ALSO PLED GUILTY TO NUMEROUS CRIMINAL CHARGES BROUGHT AGAINST HIM BY THE STATE ATTORNEY GENERAL.

GIVEN THE RECORD OF THE CMPL PROGRAM AT HHS, IT IS NOT SURPRISING THAT WE ARE STRONG ADVOCATES FOR THE EXTENSION OF SIMILAR AUTHORITY TO OTHER PROGRAMS ADMINISTERED BY OUR DEPARTMENT AS WELL AS TO OTHER AGENCIES THROUGHOUT THE FEDERAL GOVERNMENT. FOR TOO LONG, MANY PROVIDERS OF GOODS AND SERVICES TO THE GOVERNMENT HAVE BEEN PLAYING A GAME OF "CATCH ME IF YOU CAN", KNOWING FULL WELL THAT EVEN IF CAUGHT, THE CROWDED FEDERAL COURT DOCKET MINIMIZED THEIR CHANCES OF BEING PROSECUTED AND PENALIZED. WE ARE CONVINCED THAT THIS ADMINISTRATIVE AUTHORITY IS A SORELY NEEDED RESOLUTION ALTERNATIVE TO AN OVERLOADED FEDERAL COURT SYSTEM. WE ARE EQUALLY CONVINCED THAT SUCH GOVERNMENT-WIDE AUTHORITY, MODELED ALONG THE LINES OF OUR PROTOTYPE, WOULD PROVIDE A SIGNIFICANT GOVERNMENT-WIDE DETERRENT TO THOSE WHO WOULD DEFRAUD THE UNITED STATES.

AS THE CURRENT VICE-CHAIRMAN OF THE PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY (PCIE), AND IT FORMER LEGISLATIVE COMMITTEE CHAIRMAN, I HAVE CONSULTED WITH THE IG COMMUNITY ON THE PROPOSED LEGISLATIVE ALTERNATIVES. THE FOLLOWING IS A BRIEF DESCRIPTION OF SOME BROAD CATEGORIES OF CASES THAT WOULD APPEAR APPROPRIATE FOR ADMINISTRATIVE RESOLUTION.

- CASES THAT HAVE BEEN INVESTIGATED AND REFERRED TO THE DEPARTMENT OF JUSTICE FOR CRIMINAL PROSECUTION, BUT SUCH PROSECUTION WAS DECLINED, AND NO CIVIL ACTION WAS UNDERTAKEN.

- CASES WHERE THE SUBJECT IS PROSECUTED AND CONVICTED, BUT WHERE CIVIL ACTION FOR FULL RECOVERY IS NOT DEEMED WARRANTED AS COST EFFECTIVE BY THE DEPARTMENT OF JUSTICE.

- CASES WHERE NO CIVIL ACTION UNDER THE FALSE CLAIMS ACT WAS TAKEN BECAUSE:

  A: NO MONETARY INJURY TO THE UNITED STATES COULD BE ESTABLISHED;

  B: DOLLAR AMOUNT LOST TO GOVERNMENT COULD NOT BE ASCERTAINED; AND

  C: NOT DEEMED COST EFFECTIVE TO SEEK RECOVERY UNDER COURT SYSTEM.

THE ABOVE CATEGORIES IN WHICH IMPOSITION OF CIVIL MONETARY PENALTIES MIGHT HAVE BEEN SUITABLE AND EFFICACIOUS IS BY NO MEANS EXHAUSTIVE. MANY EXAMPLES WERE INCLUDED IN A JOINT STATEMENT OF ALL STATUTORY INSPECTORS GENERAL IN SUPPORT OF GOVERNMENT-WIDE AUTHORITY FOR THE CIVIL MONETARY PENALTIES FOR FRAUD, SUBMITTED TO THE SENATE COMMITTEE ON GOVERNMENTAL

AFFAIRS DURING THEIR JUNE 18, 1985 HEARING ON S.1134. THESE EXAMPLES BRING HOME THE FACT THAT AUTHORITY TO IMPOSE ADMINISTRATIVE PENALTIES FOR FRAUD IS NOT MERELY A DESIRABLE ADJUNCT TO CRIMINAL AND CIVIL COURT ACTION; IN SOME CASES; IT WOULD BE OUR ONLY EFFECTIVE SANCTION AGAINST ENTITIES WHO DEFRAUD THE GOVERNMENT.

DURING THE LAST SEVERAL YEARS, IN RESPONSE TO THE ABOVE DEMONSTRATED NEED FOR AN EFFECTIVE ADMINISTRATIVE SANCTION AGAINST FRAUD, A NUMBER OF BILLS AUTHORIZING THE IMPOSITION OF CIVIL MONETARY PENALTIES HAVE BEEN CONSIDERED BY VARIOUS COMMITTEES OF THE CONGRESS. LAST YEAR, UNDER THE LEADERSHIP OF SENATORS COHEN AND ROTH, THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS COMPLETED WORK ON S.1134, THE "PROGRAM FRAUD REMEDIES ACT OF 1985,". SIMILAR BILLS HAVE BEEN INTRODUCED IN THE HOUSE INDICATING GROWING SUPPORT FOR SUCH LEGISLATION. THE ADMINISTRATION HAS ALSO BEEN A STRONG SUPPORTER OF A CIVIL MONETARY PENALTIES BILL.

WE WOULD LIKE TO ADDRESS TWO OF THE IMPORTANT ISSUES PERTAINING TO THIS LEGISLATION: (1) THE STANDARD OF KNOWLEDGE NECESSARY FOR IMPOSITION OF PENALTIES AND ASSESSMENTS AND (2) TESTIMONIAL SUBPOENA POWER FOR INVESTIGATING OFFICIALS.

WITH RESPECT TO THE KNOWLEDGE STANDARD, THE CONGRESS HAS THE OPPORTUNITY TO ENACT A LANDMARK PIECE OF LEGISLATION -- NAMELY, TO AUTHORIZE THE GOVERNMENT TO IMPOSE CIVIL MONETARY PENALTIES AND ASSESSMENTS WHEN AN INDIVIDUAL DOING BUSINESS WITH THE GOVERNMENT SUBMITS CLAIMS OR STATEMENTS THAT HE KNOWS OR HAS REASON TO KNOW ARE FALSE. IN SO DOING, THE CONGRESS WOULD STATE THAT CLAIMANTS FOR PUBLIC FUNDS HAVE AN AFFIRMATIVE DUTY TO ASCERTAIN THE TRUE AND ACCURATE BASIS FOR THEIR CLAIMS ON WHICH THE GOVERNMENT IS ASKED TO RELY. THE DUTY SHOULD ENCOMPASS BOTH THE FACTUAL BASIS OF CLAIMS, AS

WELL AS THEIR LEGAL BASIS (THAT IS, STATUTORY, REGULATORY OR CONTRACTUAL). HOWEVER, THEIR DUTY SHOULD BE LIMITED TO WHAT IS REASONABLE AND PRUDENT UNDER THE CIRCUMSTANCES.

THE GENESIS OF THIS IDEA WAS THE CASE OF U.S. v COOPERATIVE GRAIN AND SUPPLY CO., 476 F.2d 47 (8th CIR. 1973), WHERE THE COURT SAID THAT:

> THE APPLICANT FOR PUBLIC FUNDS HAS A DUTY TO . . . BE INFORMED OF THE BASIC REQUIREMENTS OF ELIGIBILITY.

476 F.2d AT 60. THE COURT FURTHER STATED:

> . . . A CITIZEN CANNOT DIGEST ALL THE MANIFOLD REGULATIONS NOR CAN THE GOVERNMENT ADEQUATELY AND INDIVIDUALLY INFORM EACH CITIZEN ABOUT EVERY REGULATION, BUT THERE IS A CORRESPONDING DUTY TO INFORM AND BE INFORMED.

ID AT 55. THIS DUTY HAS THE PRIMARY OBJECTIVE OF REACHING THOSE WHO PLAY "OSTRICH"; THAT IS, THOSE WHO AVOID FINDING OUT THE TRUE FACTS UNDERLINING THEIR CLAIMS, OR THE CONTENT OF THE APPLICABLE RULES AND REGULATIONS, AND THEN SEEK TO HIDE BEHIND THEIR IGNORANCE. TOO OFTEN WE HEAR THE PLEA THAT "THE BILLING CLERK DID IT," OR "THEY DID THAT OUT IN THE FIELD," OR "NO ONE TOLD ME WHAT THE RULES WERE."

TYPICALLY, IT IS THE CLAIMANTS WHO CONTROL THEIR CLAIM PROCESSES, AND WHO ARE IN A POSITION TO CONDUCT REASONABLE CHECKS TO ENSURE THAT APPROPRIATE FINANCIAL AND BILLING CONTROLS FOR THEIR OWN BUSINESSES ARE IN PLACE. IT IS UNREASONABLE FOR THE GOVERNMENT TO BE EXPECTED TO KNOW THOSE CLAIMS THAT ARE PROPER AND THOSE THAT ARE NOT, TO BEAR THE RISKS OF CLAIMS GENERATED BY SLOPPY PROCEDURE OR UNTRAINED PERSONNEL. WE MIGHT ALLUDE TO THE FACT THAT IRS REQUIRES

THAT BOOKS AND RECORDS BE MAINTAINED TO JUSTIFY VARIOUS BUSINESS AND PERSONAL CLAIMS. THEREFORE, WE BELIEVE THE BURDEN OF MAKING REASONABLY SURE THAT CLAIMS ARE CORRECT, SHOULD BE PLACED ON THOSE WHO MAKE CLAIMS UPON THE TREASURY OF THE UNITED STATES.

IT IS IMPORTANT TO UNDERSTAND WHAT WE ARE NOT SAYING HERE. WE BELIEVE THAT THE LEGISLATIVE RECORD SHOULD BE CLEAR THAT THOSE WHO MAKE HONEST MISTAKES OR WHO ARE INVOLVED IN GOOD FAITH DISPUTES WITH THE GOVERNMENT WILL NOT BE PENALIZED. AS WITH OUR CMPL STATUTE AT HHS, THE BURDEN OF PROOF IS ON THE GOVERNMENT TO DEMONSTRATE KNOWLEDGE OR A REASON TO KNOW OF EITHER FALSE CLAIMS OR WILLFULL CONCEALMENT OF MATERIAL INFORMATION.

IN ORDER TO PROTECT HIMSELF, AN EXECUTIVE OF A COMPANY NEEDS ONLY TO CONDUCT SUCH STEPS AS ARE REASONABLE OR PRUDENT UNDER THE CIRCUMSTANCES TO ASSURE THE ACCURACY OF THEIR CLAIMS. THE EXECUTIVE WOULD HAVE TO HAVE REASONABLE COMPETENT PEOPLE FOR HIS BILLING PROCESS AND SEE THAT THEY RECEIVED APPROPRIATE TRAINING. FURTHER, HE SHOULD HAVE IN PLACE APPROPRIATE AUDIT CONTROLS AND INSURE THAT PERIODIC CHECKS WERE MADE TO SEE THAT THE WORK WAS BEING DONE CORRECTLY. THESE ARE SIMPLE CONCEPTS, ONES THAT A REASONABLE AND PRUDENT EXECUTIVE WOULD DO ANYWAY. THE STATUTE WOULD NOT ADD TO THESE NORMAL BUSINESS RESPONSIBILITIES.

THE SECOND ISSUE OF PARTICULAR CONCERN TO THE IGs IS THAT OF TESTIMONIAL SUBPOENA POWER FOR INVESTIGATING OFFICIALS. FOR THE FOLLOWING REASONS, WE BELIEVE STRONGLY THAT SUCH AUTHORITY WOULD PROVIDE A CRITICAL TOOL IN INVESTIGATING FRAUD AGAINST THE GOVERNMENT.

SUCCESSFUL FRAUD INVESTIGATIONS REQUIRE PROOF THAT (1) CERTAIN REPRESENTATIONS WERE MADE, (2) THOSE REPRESENTATIONS

WERE FALSE, AND (3) THE PERSON MAKING THE REPRESENTATIONS HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THEIR FALSITY. EXCEPT IN THOSE RARE CASES IN WHICH ONE OBTAINS A DIRECT CONFESSION FROM THE SUBJECT, KNOWLEDGE OR INTENT IS DIFFICULT TO PROVE. TYPICALLY, KNOWLEDGE IS PROVED BY PROVING THE FACTS AND CIRCUMSTANCES SURROUNDING THE PREPARATION AND SUBMISSION OF THE CLAIMS. HOWEVER, FEW WRONGDOERS LEAVE A SUFFICIENT "PAPER TRAIL" TO ENABLE PROOF OF KNOWLEDGE THROUGH DOCUMENTS ALONE. IN FACT, BY THE VERY NATURE OF A FRAUD CASE, MANY KEY DOCUMENTS WILL HAVE BEEN FALSIFIED AND DESIGNED TO DECIEVE.

THEREFORE, AN INVESTIGATOR MUST OBTAIN INFORMATION CONCERNING DIRECTIONS, INSTRUCTIONS AND CONVERSATIONS AMONG THE SUBJECTS AND THEIR EMPLOYEES, CLIENTS, BUSINESS ASSOCIATES, ETC. IN MOST CASES, WITNESSES AND PARTICIPANTS IN THE CONVERSATION ARE UNDER THE INFLUENCE OR CONTROL OF THE SUBJECTS AS RESULT OF EMPLOYMENT OR CONTRACTUAL RELATIONS. THEY ARE, AS A RULE, RELUCTANT TO INJURE THEIR POSITION WITH THE SUBJECT. WHERE THESE EMPLOYEES AND THEIR WITNESSES FEEL THAT THEY ARE NOT IN A POSITION TO SUBMIT VOLUNTARILY TO AN INTERVIEW, TESTIMONIAL SUBPOENA AUTHORITY WOULD PROVIDE AN ESSENTIAL TOOL TO OVERCOME THEIR RELUCTANCE TO PROVIDE EVIDENCE.

THREE ADDITIONAL POINTS SHOULD BE NOTED WITH RESPECT TO TESTIMONIAL SUBPOENAS. FIRST, THE AUTHORITY TO COMPEL ATTENDANCE AND TESTIMONY OF WITNESSES IN THE COURSE OF INVESTIGATIONS IS BY NO MEANS UNUSUAL IN THE EXECUTIVE BRANCH OF GOVERNMENT. CONGRESS HAS CONFERRED SUCH POWER IN 68 SPECIFIC STATUTES UPON A NUMBER OF FEDERAL DEPARTMENTS AND AGENCIES FOR A WIDE VARIETY OF PURPOSES. FOR EXAMPLE, THE DEPARTMENT OF JUSTICE FOR ANTITRUST CASES, THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FOR INTERSTATE

LAND SALES, THE DEPARTMENT OF TREASURY FOR CONTROLLED SUBSTANCE IMPORTATION, AND THE DEPARTMENT OF AGRICULTURE FOR THE HORSE PROTECTION ACT. OTHER DEPARTMENTS INCLUDE TRANSPORTATION, COMMERCE, LABOR, INTERIOR, ENERGY, AND HHS. IF TERSTIMONIAL SUBPOENA AUTHORITY CAN BE GRANTED TO THESE VARIOUS AGENCIES AND DEPARTMENTS, SURELY THE INSPECTORS GENERAL SHOULD HAVE THIS AUTHORITY FOR THE PURPOSE OF COMBATTING FRAUD AGAINST THE UNITED STATES.

SECOND, LEGITIMATE DUE PROCESS SAFEGUARDS TO PROTECT THE INDIVIDUAL WHOSE TESTIMONY IS COMPELLED MAY BE INCLUDED IN THE GRANT OF SUBPOENA POWER. FOR EXAMPLE, SPECIFIC PROVISIONS FOR THE ASSISTANCE OF COUNSEL, RIGHT OF ACCESS TO TRANSCRIPTS, RIGHT TO A GENERAL STATEMENT OF THE SCOPE OF THE INVESTIGATION, AND SOME DEGREE OF CONFIDENTIALLY ALL SEEM TO BE APPROPRIATE PROTECTION FOR THE WITNESS.

THIRD, PROCEDURES COULD BE PRESCRIBED FOR ENFORCEMENT OF SUBPOENAS. FOR EXAMPLE, THE LEGISLATION COULD STATE THAT AN IG WOULD HAVE TO SEEK, FIRST, THE CONCURRENCE AND ASSISTANCE OF THE JUSTICE DEPARTMENT, AND THEN, A FEDERAL DISTRICT COURT WOULD HAVE TO BE PERSUADED TO ISSUE AN ORDER ENFORCING THE SUBPOENA.

IN CONCLUSION, LET ME AGAIN EMPHASIZE OUR SUPPORT FOR EXTENSION OF CIVIL MONETARY PENALTIES AUTHORITY TO ALL AGENCIES THROUGHOUT THE FEDERAL GOVERNMENT IN A MANNER MODELED ON OUR EXISTING EXPERIENCE WITH THE CMPL AT HHS. BASED ON THAT EXPERIENCE, WE BELIEVE THAT SUCH LEGISLATION, IF ENACTED, WOULD GREATLY ENHANCE THE ABILITY OF THE UNITED STATES TO REMEDY AND ULTIMATELY TO DETER, FRAUD.

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Senator **Hatch**. Thank you, Mr. Kusserow. We appreciate that. I think I will just submit questions to you in writing.

Mr. **Kusserow**. Thank you, Mr. Chairman.

Senator **Hatch**. Thank you for coming. We appreciate both of you coming.

Mr. **Kusserow**. Thank you.

[The questions of Senator Hatch follow:]

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

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RANDALL R. RADER, CHIEF COUNSEL AND STAFF DIRECTOR

July 3, 1986

The Honorable Richard Kusserow
Inspector General
Department of Health and Human Services

Dear Mr. Kusserow:

As indicated in the Commiteee's hearing on June 17, 1986, concerning S. 1134, false claims and fraud legislation, I would appreciate your written responses to the attached questions. Please return your answers to the Committee in 212 Senate Dirksen Office Building, Washington, D.C. 20510 not later than the close of business on July 15, 1986 . If your have any questions please contact Jean Leavitt at (202) 224-8191.

QUESTION 1): As you know, the courts today are split among three different views of the appropriate standard of knowledge or intent for fraud actions, varying from a "constructive knowledge" test, adopted only by the eighth circuit, to actual knowledge with specific intent to defraud the United States, a position held by the fifth and ninth circuits. The majority of circuits rejected both of these positions and have adopted the view that proof of actual knowledge is required but specific intent to defraud the United States is not. I have concerns that both S. 1134 and S. 1562, contain a very liberal gross negligence standard. The American Bar Association and others have recommended a definition of knowledge which includes actual knowledge, deliberate ingorance and reckless disregard for the truth. Can you respond to these concerns that a gross negligence standard for a fraud action is inappropriate ?

[illegible] Under S. 1134, the agency's [illegible] personal appearance and testi[illegible] [illegible] of the nature of the questioning or [illegible] of the investigation. The person subpoenaed is not even given notice that he may be accused of wrongdoing. In addition to concerns for the lack of Due Process protections for the subject, there are concerns that it has not been made clear why governmental agencies in civil proceedings should be entitled to benefits not available to ordinary civil litigants, particularly when the inspector general already has very broad powers of investigation under current law. How would you respond to these concerns?In light of these concerns regarding the unlimited subpoena power, what provisions could be added to protect against potential abuse?

QUESTION 3): S. 1134 combines the investigative, prosecutorial and ajudicative functions into one agency.

Given the serious nature of fraud charges and their impact upon personal and business reputations, many are concerned that the hearing officer under this procedure is not sufficiently isolated from the political and programatic concerns of his agency so as to afford the plaintiff with a fair and impartial hearing. How would you respond to this concern and would you offer suggestions that would ensure greater Due Process protections?

Thank you for your willingness to answer these questions. With kindest regards and best wishes,

Sincerely,

Orrin G. Hatch
United States Senator

OGH:jl

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of Inspector General

AUG 13 1986

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are responding to your letter of July 3, 1986 regarding S.1134, specifically, the issues of (1) the standard of knowledge required for imposition of liability, (2) testimonial subpoena authority for Inspectors General, and (3) the use of the administrative process as a remedy for fraud. Thank you for the opportunity to bring our views on these issues to your attention.

As you know, we are a strong supporter of S.1134, as are all eighteen statutory Inspectors General. We believe there is a need for an administrative remedy to handle cases of fraud against the United States, where the Department of Justice declines to proceed in U.S. District Court under the False Claims Act. As you know, here at the Department of Health and Human Services (HHS), we have been using a prototype of S.1134 (the Civil Monetary Penalty Law, 42 U.S.C. 1320a-7a), in order to recover millions of dollars from health care providers who have defrauded Medicare and Medicaid. This program shows than an administrative remedy can be effective in recovering monies unlawfully claimed against Government programs, in a manner which is fair to all parties. In addition, we believe that this Act has served as a significant deterrent to those who would defraud Medicare and Medicaid.

With respect to the first issue you raised, the knowledge standard, we believe that the Congress should take this opportunity to enunciate a national policy that a claimant of Government funds has a duty to make a reasonable inquiry regarding the factual and legal bases of those claims. This duty has the primary objective of reaching "ostriches," i.e., those who avoid finding the true facts underlying their claims, or the content of applicable rules and regulations. It is our understanding that the sponsors of this legislation have chosen to adopt the knowledge standard advocated by a section of the American Bar Association, that is, requiring the Government to show acutal knowledge, deliberate ignorance of the facts, or reckless disregard of the facts. We believe that this standard reasonably achieves the goals specified above, although we continue to prefer an express statement that claimants are under a duty to make an inquiry as to the legal and factual bases of claims.

The second issue raised in your letter is testimonial subpoena authority for Inspectors General for investigations of fraud. While Inspectors General currently have authority to subpoena documents, there is no authority for subpoenaing persons to give testimony. In our view, the testimonial subpoena is a critical investigative tool. In a fraud case, the Government has the burden of proof to show that (1) certain representations were made, (2) those representations were false, and (3) the person making the representations had actual or constructive knowledge of their falsity. Except in those rare cases in which one obtains a direct confession from the subject, knowledge or intent is difficult for the Government to prove. Typically, knowledge is shown by proving the facts and circumstances surrounding the preparation and submission of the claims, allowing the finder of the fact to infer that the subject had knowledge that the claims were false.

However, few wrongdoers leave a sufficient "paper trail" to enable proof of knowledge through documents alone. Therefore, an investigator must obtain information concerning oral instructions and conversations among the subject and others, such as employees, clients, and business associates. In most cases, witnesses to, and participants in such conversations are under the influence or control of the subject as result of employment or contractual relations. They are, as a rule, reluctant to injure their position with the subject. Where these witnesses and participants feel that they are not in a position to submit voluntarily to an interview, testimonial subpoena authority provides an essential tool to obtain their evidence.

It is important to note that the Congress has previously granted testimonial subpoena authority to departments and agencies for investigations in sixty-eight other contexts. A list of these authorities is enclosed. The list includes the major anti-fraud agencies of the Government, such as the Federal Trade Commission, Securities and Exchange Commission, and Commodity Futures Trading Commission. If testimonial subpoena authority can be granted to this wide spectrum of departments and agencies for various purposes, surely the statutory Inspectors General should have this critical power for investigations of fraud against the United States.

We believe that the recent version of the testimonial subpoena authority adopted by the sponsors of S.1134 is a very carefully limited authority, with appropriate due process safeguards for those subpoenaed. Significantly, prior to such a subpoena being issued, the Department of Justice would be required to approve the subpoena, and it could not later be enforced unless the Department of Justice is successful in obtaining an enforcement order from a U.S. District Court Judge.

We would oppose any requirement in this authority that the potential subject(s) be notified of a subpoena and that they be afforded the right to be present at the taking of the testimony. Such a procedure is contrary to all the other subpoena authorities with whicn we are familiar; we know of no agency where the subject of the investigation participates in the investigation. We are concerned with the potential chilling effect on employees or business associates who are testifying, if the subject is sitting at the same table. And again, this procedure is at the investigatory stage of a proceeding, where the Government is attempting to determine whether adequate evidence exists to meet its burden of proof. Later in the proceeding, a respondent is afforded formal notice of any charges, a hearing where he can confront all witnesses presented by the Government, a decision based on the evidence received, appeal to the courts, and the many other due process rights delineated in S.1134.

The last issue raised in your letter concerns the administrative process, where the investigatory, prosecutorial and adjudicative functions are in one agency. While this structure may seem unfair on the surface, both S.1134 and the Administrative Procedure Act require separation of these functions within the agency. In fact, most if not all administrative tribunals within the United States Government combines these functions in one agency.

If the concern is that Federal departments and agencies are not capable of rendering fair and just treatment in cases involving large dollar amounts in complex cases, such a proposition is totally at odds with the authorities Congress has already entrusted to a variety of executive departments and independent agencies. For example, the Office of Hearings and Appeals at the Department of Energy has been adjudicating the liability of major oil producers for penalties and overcharges of over one half billion dollars per case in some instances. A number of departments and agencies, such as Defense, Housing and Urban Development, Transportation and the National Aeronautics and Space Administration, employ administrative law judges (ALJs) on Boards of Contract Appeals, who preside over complex contract disputes with no dollar limit over the amount in controversy. It is not at all uncommon for such claims to involve millions of dollars.

The Department of Labor administers several statutes (e.g., mine safety and health, fair labor standards and certain civil rights actions) which call for hearings before ALJs with amounts in controversy up to $8 million. The Environmental Protection Agency administers Superfund and other litigation before ALJs with controversies worth tens of millions. The Grant Appeals Board at the Department of HHS, staffed by board members appointed by the Secretary, adjudicates HHS grant disallowances that commonly involve amounts in excess of $5 million, and as much as $100 million.

In addition, many independent agencies adjudicate cases of considerable size and dollar value before ALJs. For example, ALJs at the Federal Energy Regulatory Commission have decided several cases where more than a billion dollars was at stake. The Federal Trade Commission adjudicates anti-trust suits directed at restructuring whole industries before ALJs. ALJs also adjudicate cases worth many millions of dollars at the Securities and Exchange Commission, Federal Communications Commission, International Trade Commission, and the Commodity Futures Trading Commission.

In summary, we believe that S.1134 provides for appropriate standards of liability and contains appropriate due process rights for respondents.

Sincerely yours,

Richard P. Kusserow
Inspector General

Enclosure

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
5 U.S.C. § 1205	Merit Systems Protection Board	Investigations relating to hearings within its jurisdiction
5 U.S.C. § 1507	Merit Systems Protection Board	Investigations of political activity of certain state and local employees
5 U.S.C. § 7131	Federal Labor Relations Authority	Investigations within its jurisdiction
7 U.S.C. § 15	Commodity Futures Trading Commission	Investigations under the Commodity Exchange Act, 7 U.S.C. § 1 et seq.
7 U.S.C. § 87f	Administrator of the Federal Grain Inspection Service	Investigations under the United States Grain Standards Act, 7 U.S.C. §§ 71 et seq.
7 U.S.C. § 511n	Secretary of Agriculture	Tobacco inspection
7 U.S.C. § 2115	Secretary of Agriculture	Investigations under the Cotton Research and Promotion Act, 7 U.S.C. 2101 et seq.
7 U.S.C. § 2622	Secretary of Agriculture	Inspections under the Potato Research and Promotion Act, 7 U.S.C. §§ 2601 et seq.
7 U.S.C. § 2717	Secretary of Agriculture	Investigations under the Egg Research and Consumer Information Act, 2 U.S.C. §§ 2701 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
7 U.S.C. § 2917	Secretary of Agriculture	Inspections under the Beef Research and Information Act, 7 U.S.C. §§ 2901 et seq.
7 U.S.C. § 3412	Secretary of Agriculture	Investigations under the Wheat and Wheat Foods Research and Nutrition Education Act, 7 U.S.C. §§ 3401 et seq.
7 U.S.C. § 4317	Secretary of Agriculture	Investigations under the Floral Research and Consumer Information Act, 7 U.S.C. 4301 et seq.
7 U.S.C. § 4511	Secretary of Agriculture	Investigations under the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501 et seq.
8 U.S.C. § 1446	Attorney General or Immigration and Naturalization Service	Investigation of naturalization petitioner
12 U.S.C. § 1464	Federal Home Loan Bank Board	Investigations with respect to Federal Savings and Loan Associations
12 U.S.C. § 1730	Federal Savings and Loan Insurance Corporation	Examinations of insured institutions
12 U.S.C. § 1786	National Credit Union Administration Board	Investigations of insured credit unions
12 U.S.C. § 1818	Bank supervisory agencies	Investigations connected with the Federal Deposit Insurance Corporation programs
12 U.S.C. § 2404	National Commission on Elections Transfer	Investigations within its jurisdiction

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
12 U.S.C. § 2617	Secretary of Housing and Urban Development	Investigations under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.
15 U.S.C. § 57b-1*	Federal Trade Commission	Investigation of unfair or deceptive methods of competition
15 U.S.C. § 77s	Security and Exchange Commission	Investigations under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq.
15 U.S.C. § 77uuu	Securities and Exchange Commission	Investigations under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa et seq.
15 U.S.C. § 780	Securities and Exchange Commission	Investigations under the Securities Exchange Act of 1934, 15 U.S.C. §§78a et seq.
15 U.S.C. § 79r	Securities and Exchange Commission	Investigations under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 et seq.
15 U.S.C. § 80b-9	Securities and Exchange Commission	Investigations relating to investment companies and advisors under 15 U.S.C. §§80b-1 et seq.
15 U.S.C. § 80a-41	Securities and Exchange Commission	Investigations relating to investment companies and advisors under 15 U S.C. §§ 80a-1 et seq.
15 U.S.C. § 634	Small Business Administration	Investigations under the Small Business Act, 15 U.S.C. 631, et seq.

*Civil investigative demand

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
15 U.S.C. § 687b	Small Business Administration	Investigations relating to revocation of license granted under 15 U.S.C. § 671 et seq.
15 U.S.C. § 717m	Secretary of Energy	Investigations under the natural gas provisions of 15 U.S.C. §§ 717 et seq.
15 U.S.C. § 772	Secretary of Energy	Investigations under the Federal Energy Act of 1974, 15 U.S.C. §§ 761 et seq.
15 U.S.C. § 1312*	Attorney-General or Antitrust Division of Department of Justice	Civil antitrust investigation
15 U.S.C. § 1401	Secretary of Transportation	Investigations under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 et seq.
15 U.S.C. § 1714	Secretary of Housing and Urban Development	Investigations under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq.
15 U.S.C. § 1825	Secretary of Agriculture	Investigations under the Horse Protection Act, 15 U.S.C. §§ 1821 et seq.
15 U.S.C. § 1914	Secretary of Transportation	Investigations to carry out the bumper standards law; Cost Saving Act, 15 U.S.C. §§ 1961 et seq.
15 U.S.C. § 1944	Secretary of Transportation	To carry out the purposes of the automobile consumer information study law, 15 U.S.C. § 1941 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
15 U.S.C. § 2005	Secretary of Transportation the Environmental Protection Administrator	Investigations under the law requiring fuel economy standards, 15 U.S.C. § 2001 et seq.
15 U.S.C. § 2076	Consumer Product Safety Commission	Investigations within its jurisdiction
15 U.S.C. § 4013x	Attorney General or Antitrust Division of Department of Justice	Investigations connected with issuance of export trade certificates of review
16 U.S.C. § 773 i	Secretary of Commerce	Law enforcement investigations under the Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773 et seq.
16 U.S.C. § 825f	Secretary of Energy and the Federal Energy Regulatory Commission	Investigations under the Federal Power Act, 16 U.S.C. §§ 791 et seq.
18 U.S.C. § 1968*	Attorney General	Racketeer Influenced Corrupt Organizations (RICO) statute investigations
19 U.S.C. § 2321	Secretary of Labor	Investigations connected with trade adjustment assistance
21 U.S.C. § 876	Attorney General	Investigations relating to controlled substance law under 21 U.S.C. §§ 801 et seq.
21 U.S.C. § 967	Secretary of the Treasury	Investigations relating to smuggling of controlled substances
22 U.S.C. § 287c	Secretary of Treasury	Investigations relating to Rhodesian sanctions

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
22 U.S.C. § 1623	Foreign Claims Settlement Commission	Investigations of claims within its jurisdiction
22 U.S.C. § 2824	Commission on the Organization and Conduct of Foreign Policy	Investigations within its jurisdiction
22 U.S.C. § 3004	Commission on Security and Cooperation in Europe	Investigations within its jurisdiction
29 U.S.C. § 161	National Labor Relations Board	Investigations relating to representative elections and unfair labor practices
29 U.S.C. § 1303	Pension Benefit Guaranty Corporation	Investigations Under the Employee Retirement Income Security Act of 1924, 29 U.S.C. §§ 1301 et seq.
29 U.S.C. § 1862	Secretary of Labor	Investigations under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq.
30 U.S.C. § 1717	Secretary of Interior	Investigations under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 et seq.
33 U.S.C. § 506	Secretary of Transportation	Investigative hearings relating to reasonableness of bridge tolls
33 U.S.C. § 1907	Secretary of Transportation	Investigations under the Act to Prevent Air Pollution from Ships, 33 U.S.C. §§ 1901 et seq.

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
42 U.S.C. § 405	Secretary of Health and Human Services	Investigations under Title II of the Social Security Act, which concerns federal old-age, survivors, and disability insurance benefits
42 U.S.C. § 5413	Secretary of Housing and Urban Development	Investigations relating to functions under the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 et seq.
45 U.S.C. § 40	Secretary of Transportation	Investigations connected to railway accidents
45 U.S.C. § 362	Railroad Retirement Board	Investigations within its jurisdiction
46 U.S.C. § 1124	Secretary of Commerce	For functions under merchant marine legislation, 46 U.S.C. §§ 1101 et seq.
46 U.S.C. App. § 1717	Advisory Commission on Conferences in Ocean Shipping	To carry out its functions
47 U.S.C. § 409	Federal Communications Commission	Investigations under the Communications Act of 1934, 47 U.S.C. §§ 151 et seq.
49 U.S.C. § 502	Secretary of Transportation	Investigations under legislation relating to motor carriers of migrant workers

INVESTIGATIVE STATUTORY TESTIMONIAL SUBPOENA AUTHORITY

Statute	Agency	Purpose
49 U.S.C. § 305	Interstate Commerce Commission	Investigations within its jurisdiction under the Interstate Commerce Act, 49 U.S.C. §§ 10101 et seq.
49 U.S.C. § 10321	Interstate Commerce Commission	Investigations under part II of the Interstate Commerce Act, 49 U.S.C. § 302 et seq. relating to motor carriers
50 U.S.C. App § 643a	Any federal agency involved as the Chairman of the War Production Board	Investigation of war contracts
50 U.S.C. App § 2001	Foreign Claims Settlement Commission	Investigation under the War Claims Act of 1948

Senator HATCH. The last two witnesses will be Hon. Judge Emory Sneeden and Mr. Joseph Creighton, representing the National Association of Manufacturers.

We are happy to have both of you come before the committee. We respect both of you, and we will be interested in your comments criticizing this particular piece of legislation.

We will start with you, Judge Sneeden. I am going to have to limit you to 5 minutes each, if you can, because I just have to get to this Utah luncheon. It happens to deal with our steel problems out in Utah and I just simply have to be there.

STATEMENT OF EMORY M. SNEEDEN ON BEHALF OF WESTINGHOUSE ELECTRIC CORP.; AND JOSEPH R. CREIGHTON ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. SNEEDEN. Thank you, Mr, Chairman. If you will just call time on me at 5 minutes, I will quit.

Senator HATCH. I will, Emory. I know you understand that better than anybody.

Mr. SNEEDEN. Yes, sir.

Mr. Chairman and members of the committee, it is a great pleasure to appear before you to testify regarding S. 1134. I will limit my remarks to that bill. I do not address, nor have I studied Senator Grassley's proposal which this committee earlier ordered reported.

I am appearing today on behalf of the Westinghouse Electric Corp. Senator Hatch, I am going to skip down, if I may, and get right to the meat of this statement.

Senator HATCH. That would be fine.

Mr. SNEEDEN. My prepared statement identifies and discusses those issues that I feel should be of greatest concern to this committee. In my oral presentation today, I would like to highlight two constitutional issues, which I believe are raised by the provisions of S. 1134.

One of these issues was not directly addressed by the Governmental Affairs Committee report; the other was briefly considered in the committee report. The first and most fundamental issue is whether there is an article III separation of powers problem posed by this bill.

As you know, article III of the U.S. Constitution provides that the judicial power of the United States shall be vested in a Supreme Court and such inferior courts as the Congress creates. The primary attribute of article III courts is that they are comprised of judges who have life tenure, and who are not subject to diminution of pay. Thus, the question raised is whether Congress may be improperly, in this bill, referring to an administrative panel actions historically based in common law. I am not talking about OSHA, which Congress clearly had a right to set up, and Medicare which was set up by statute. Congress further established procedures in aid of those statutes which it clearly had the authority to do.

Under the bill, persons may have administrative proceedings brought against them for activities essentially amounting to fraud and negligent misrepresentation. I refer you to my full statement on this—it is clear, and there is a citation supporting the proposition—that fraud and negligent misrepresentation are common law offenses.

Liability for these torts exists, regardless of the passage of any legislation. The Senate is not taking a rifle shot under this bill. It is a shotgun blast covering all the departments listed in the bill, from Agriculture right across the board to the Small Business Administration. There must be 15 or 20 agencies. I have not counted them.

Statutes such as the False Claims Act do not create an entirely new cause of action for the Government, but they provide for additional remedies such as civil penalties and twice the amount of actual damages.

S. 1134 also provides remedies that are unavailable at common law, but the causes of action involved—and this is the point—are clearly grounded in the common law.

The administrative scheme which would be established by S. 1134 is clearly different from others created by Congress, as I mentioned a minute ago, such as the Occupational Health and Safety Act, and in aid of that Congress established enforcement procedures. In the National Labor Relations Act, again, Congress established procedures to make sure that law worked. There are others, such as the Commodity Exchange Act. There Congress created entirely new statutory causes of action unknown to the common law and referred their adjudication to administrative forums.

The holding of a case that is very familiar to this committee, *Northern Pipe Line Construction Co.* v. *Marathon Pipeline Co.,* suggests that the referral of such traditional common law actions to an administrative forum may be unconstitutional, although that was, I submit, Senator Hatch, a State common law action in contact. I submit now what we are talking about is the Federal common law.

Mr. Chairman, I cannot unequivocally state that the provisions of this bill would violate article III, and I do not think anyone could; but it is the duty of the Senate, as you know and I know, to consider this issue as prior to passing legislation.

Supreme Court precedents concerning article III make up one of the most controversial and confusing areas of the law, and I am almost quoting Mr. Justice White on that point. One would need a crystal ball to determine the fate of S. 1134 before the Court.

Congress has a responsibility to consider, however, this issue and to make its best determination of whether passage of S. 1134 would comport with the requirements of article III. It must also determine whether as a policy matter actions based upon common law fraud and negligent misrepresentation should be referred to non-article III forums, where the right to a jury trial and other procedural rights are not afforded.

As members of this committee well know from their efforts to enact a constitutional bankruptcy system, consideration of the article III implications of a piece of legislation is vital to its ultimate survival.

I have got another 2 or 3 minutes of comments on jury trial, but I am going to submit those for the record.

Thank you.

[The prepared statement of Mr. Sneeden follows:]

PREPARED STATEMENT OF EMORY M. SNEEDEN

Mr. Chairman and Members of the Committee, it is a great pleasure to appear before you to testify regarding S. 1134, the Program Fraud Civil Remedies Act of 1985. As you know, I am appearing today on behalf of my client, the Westinghouse Electric Corporation.

I would first like to commend the distinguished Chairman of this Committee, Senator Thurmond, and the distinguished Chairman of the Constitution Subcommittee, Senator Hatch, for deciding to hold a hearing on S. 1134. This bill has already been favorably reported by the Committee on Governmental Affairs and is pending on the Senate Calendar. Thus, timely attention is needed to address the issues raised by this legislation.

While no responsible individual or company could disagree with the goal of reducing and, if possible, eliminating fraud against the Government, it is crucial that the legislative mechanism chosen by Congress to accomplish that goal be in accord with the Constitution, be fair to all parties involved, and be carefully crafted in terms of its liability provisions. In its present form, S. 1134 raises significant concerns in each of these areas. Moreover, many of the issues presented by this legislation, particularly those relating to the constitutionality of the bill, are of obvious interest to this Committee.

I appreciate this opportunity to present my views and concerns regarding S. 1134. My testimony today will identify and briefly discuss those constitutional issues that I feel should be of greatest concern to this Committee. My client's additional concerns about this bill are detailed in an appendix to my statement.

ARTICLE III -- SEPARATION OF POWERS

Mr. Chairman, I would like to discuss two constitutional issues that are raised by the provisions of S. 1134. One of these issues was not directly addressed by the Governmental Affairs Committee, and the other was only briefly addressed in the Committee's Report. S. Rept. No. 212, 99th Cong., 1st Sess. (1985).

The first, and most fundamental, issue is whether there is an Article III separation of powers problem posed by the provisions of S. 1134. Article III of the United States Constitution provides that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. The primary attribute of an Article III court is that it is comprised of judges who have life tenure and who are protected from any salary diminution. Despite the clear mandate of Article III, courts have recognized that Congress, under certain circumstances, has broad authority to create and refer seemingly judicial functions to a non-Article III forum. That authority is not, however, without limit. For example, Congress cannot refer certain disputes between private parties to a non-Article III forum. See Northern Pipeline Construction Company v. Marathon Pipe Line Company, 102 S. Ct. 2858 (1982) (a non-Article III bankruptcy court may not adjudicate a traditional state common law contract action).

Congress has greater authority to refer a matter to a non-Article III forum if the dispute is between the Government and a private party. This principle, known as the "public rights" doctrine, governs referral of matters to administrative agencies. Although first set forth in 1856 in Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 15 L.Ed. 372 (1856), the extent of the doctrine is still unclear. At a minimum, a public right occurs "between the Government and others." *Northern Pipeline*, 102 S.Ct. at 2870 (quoting *Ex parte Bakelite Corp.*, 49 S. Ct. 411, 416 (1929)). *See also Crowell v. Benson*, 52 S. Ct. 285 (1932). The fact that the United States is a party to the proceeding, however, is a "necessary but not sufficient means of distinguishing 'private rights' from 'public rights'." *Northern Pipeline*, 102 S.Ct. at 2870 n.23.

Case law also indicates that a public right is one statutorily created by Congress, not one that historically existed at common law. In discussing the holding of *Crowell*, Justice Brennan observed the following in his plurality opinion in *Northern Pipeline*:

> [W]hile *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign fact finding functions to an adjunct created to aid in the adjudication of *congressionally created statutory rights, Crowell does not support the further proposition necessary to appellants' argument -- that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress*.

102 S. Ct. at 2877 (emphasis added).

Furthermore, Justice Brennan had earlier stated that the public rights doctrine:

> extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell v. Benson*, 285 U.S. 22, 50, 52 S. Ct. 285, 292, 76 L.Ed. 598 (1932), *and only to matters that historically could have been determined exclusively by those departments*, see *Ex parte Bakelite Corp.*, *supra*, 279 U.S., at 458, 49 S. Ct., at 416 . . . The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "*inherently . . . judicial*." [citations omitted.] For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. *Ibid*. *Concluding that the matter had not traditionally been one for judicial determination*, the Court perceived no bar to Congress' establishment of summary

> procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.

Id. at 2869-70 (emphasis added).

Applying these principles to the administrative scheme created by the Program Fraud bill, the question raised is whether Congress may be improperly referring actions based in common law -- matters which have historically been heard by the courts -- to an administrative agency. Under the bill, persons may have adminstrative proceedings brought against them for activities essentially amounting to fraud and negligent misrepresentation. Actions for both fraud and negligent misrepresentation have historically existed at common law. *See* W. Prosser, *Law of Torts* §105 (1971).

Liability for these torts exists regardless of the passage of any legislation and thus was not created by such legislation. Statutes such as the False Claims Act (FCA), 31 U.S.C. §§3729 *et seq*., do not create an entirely new cause of action for the Government, but instead provide additional remedies. *See* *United States v. Mead*, 426 F.2d 118, 123 (9th Cir. 1970) (the False Claims Act is not in derogation of the common law but is merely another remedy which the government can invoke to protect itself from fraud). Case law makes it clear that the United States had, and continues to have, a common law right to sue for fraud despite passage of the False Claims Act. *See* *United States v. Borin*, 209 F.2d 145, 148 (5th Cir.), *cert*. *denied*, 348 U.S. 821 (1954) ("It is well settled that no statute is necessary to authorize the United States to recover funds, the illegal payment of which was induced by fraud."); *see also* *United States v. Silliman*, 167 F.2d 607, 611 (3rd Cir.), *cert*. *denied*, 335 U.S. 825 (1948) (the fact that Congress passed a statute applicable to those who make false claims is not to be interpreted as depriving the United States as plaintiff of remedies which it has for violation of a common law right).

S. 1134 would also provide the Government with remedies that are not available at common law. For example, the bill provides for the imposition of civil penalties of up to $10,000 for each violation of its provisions. Under the bill, a person is liable for an "assessment" of twice the amount of a claim or portion of a claim determined to be false or fraudulent, rather than for "damages."

While S. 1134 provides new remedies, the causes of action involved are still clearly grounded in common law. Thus, the administrative scheme established in the present legislation may be distinguished from that considered by the Supreme Court in Atlas Roofing Company v. Occupational Safety and Health Commission, 97 S.Ct. 1261 (1977). In Atlas Roofing, the Supreme Court specifically addressed whether adjudication of violations of the Occupational Safety and Health Act (OSHA) violated the Seventh Amendment's requirement that the right to a jury trial be preserved in suits at common law. The Court also discussed, however, the public rights doctrine and the circumstances under which Congress could refer adjudication of certain rights to an administrative forum. While the Court noted that new remedies were created by OSHA, it also pointed out that the Act created a "new statutory duty" to avoid maintaining unsafe or unhealthy working conditions. Id. at 1264. The Court further noted that existing state statutory remedies and common law remedies for actual injury and wrongful death remained unaffected. Id.

With regard to referral of violations of the Act to an administrative forum, the Court stated that "Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." Id. at 1266-67 (emphasis added). The Court went on to make clear, however, that the new statutory duty created by OSHA was not based in common law:

> Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved.

Id. at 1272 (emphasis added).

The administrative scheme which would be established by S. 1134 is obviously different from that of OSHA. The actions that may be adjudicated in an administrative forum under the Program Fraud bill are clearly known to common law. Prior to passage of any statute, the Government could have brought a common law action for fraud or negligent misrepresentation to recover its losses resulting from such activities. By contrast, the passage of OSHA created a new statutory duty and provided the Government with the authority to prosecute a breach of that duty. Prior to enactment of OSHA, the Government had no authority to bring suit against an employer. Instead, only the employee or his family was entitled to bring suit for injury or wrongful death. Thus, in enacting OSHA, Congress provided a totally new cause of action for the Government. S. 1134, on the other hand, essentially codifies previously existing common law actions and provides additional remedies unavailable at common law. The former may clearly be referred to an administrative forum. The latter should be referred to an administrative forum only after carefully analyzing the Article III implications.

The mere passage of a statute that codifies the essence of previously existing rights should not automatically convert such rights into statutory causes of actions that may then be referred to a non-Article III forum. Acceptance of such a proposition could result in a serious weakening of Article III protections. Congress could, if it wished, codify numerous common law rights and then require that they be litigated in an administrative forum. This cannot be an appropriate result.

Mr. Chairman, the case law governing the issue of which matters may be referred to a non-Article III forum and which matters must be heard by an Article III judge is far from clear. As Justice White pointed out in his dissent in Northern Pipeline, this is "one of most confusing and controversial areas of constitutional law." 102 S.Ct. at 2883.

For example, in the recent case of Thomas v. Union Carbide Agricultural Products Co., 105 S.Ct. 3325 (1985), the Supreme Court, through Justice O'Connor, criticized the analysis of the public rights doctrine found in Justice Brennan's plurality opinion in Northern Pipeline. In Union Carbide, the Court upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requiring mandatory arbitration of disputes between private parties regarding compensation for the use of certain data by the Environmental Protection Agency. The Court noted that the rights involved resulted from the passage of FIFRA and did not depend on, or replace, a right to compensation under state law. Id. at 3335. Justice O'Connor found, however, that the public rights doctrine does not provide a "bright line" test for determining the requirements of Article III. Id. at 3336. She noted in dictum that the statutory scheme approved in Crowell v. Benson involved the displacement of a traditional cause of action and affected a pre-existing relationship based on a common law contract for hire -- an action which would clearly have fallen into the range of matters reserved to Article III courts under the holding of Northern Pipeline. Id. Justice O'Connor concluded that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III" and counseled that consideration be given to the origin of the right at issue and the concerns that guided Congress to select a particular method of dispute resolution. Id. Also important to an analysis of S. 1134, she emphasized that the majority in Northern Pipeline did not "endorse the implication of the private right/public right dichotomy that Article III has no force simply because a dispute is between the Government and an individual." Id.

Northern Pipeline and Union Carbide, taken together, present at best a confused picture of what matters must be reserved to an Article III court. Congress has a responsibility, however, to consider this issue and to make its best determination of whether passage of S. 1134 would comport with the requirements of Article III. It must also determine whether, as a policy matter, actions based in common law fraud and negligent misrepresentation should be referred to a non-Article III forum where the right to a jury trial and other procedural rights are not afforded. As the Members of this Committee well know from their strenuous efforts to enact a constitutional bankruptcy system, consideration of the Article III implications of a piece of legislation is vital to its ultimate survival.

SEVENTH AMENDMENT -- RIGHT TO TRIAL BY JURY

By requiring adjudication in an administrative forum, S. 1134 obviously does not provide for a trial by jury. The Seventh Amendment to the United States Constitution, however, requires that "[i]n suits at common law, where the value in Controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." Throughout the years, courts have treasured and safeguarded this constitutional right. "It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts than can a single judge." Sioux City & Pacific Railway Co. v. Stout, 84 U.S. (1 Wall.) 657, 664 (1873). Moreover, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Beacon Theatres, Inc. v. Westover, 79 S.Ct. 948, 952 (1959) (quoting Dimick v. Schiedt, 55 S.Ct. 296, 301 (1935)).

As stated earlier, an action brought under the Program Fraud bill is essentially a common law action for fraud or negligent misrepresentation. When the only remedy sought for fraud or misrepresentation is damages, the action is legal in nature and the accused must be given a jury trial. 9 C. Wright & K. Miller, Federal Practice and Procedure §2311 (1971).

The Program Fraud bill permits an "assessment" of twice the value of a false claim made to the Government and provides for a $10,000 "civil penalty" for false claims or statements. Its proponents agrue that the bill is meant to compensate the Government for its injuries and to provide a mechanism to punish persons who defraud or who misrepresent facts. Although they bear the statutory labels of "assessments" and "penalties," these provisions by their form and function are analagous to damages and punitive damages. Federal courts have held that there is a constitutional right to have a jury assess punitive damages for fraud. Smyth Sales, Inc. v. Petroleum Heat & Power Co., 141 F.2d 41 (3rd Cir. 1944). A jury trial should therefore be provided for what is arguably a codification of a common law action for fraud or misrepresentation which carries the familiar threat of damages or punitive damages.

The cases relied on in the Governmental Affairs Committee Report do not counter the assertion that a jury trial was mandated in common law actions for fraud in which damages were sought. As discussed earlier, the Supreme Court in Atlas Roofing v. Occupational Safety and Health Review Commission, 97 S.Ct. at 1272, specifically noted that the cause of action created by Congress when it enacted OSHA was "unknown at common law." Similarly, in National Labor Relations Board v. Jones & Laughlin Steel Corp., 57 S.Ct. 615 (1937), the Supreme Court rejected a Seventh Amendment challenge to the National Labor Relations Act, and noted that:

> [t]he instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Id. at 629. The Report quotes the preceding language but does not address the fact that actions under the Program Fraud bill are in the nature of common law suits and that actions for fraud and negligent misrepresentation are clearly known to the common law. *Report* at 32. The creation of a statutory scheme *per se* should not render these actions purely "statutory" proceedings not subject to the Seventh Amendment. As with the Article III analysis, such an interpretation cannot be correct because it could lead to an emasculation of the Seventh Amendment.

ADDITIONAL COMMENTS OF
WESTINGHOUSE ELECTRIC CORPORATION

CONCERNING S. 1134
THE PROGRAM FRAUD CIVIL
REMEDIES ACT OF 1985

STANDARD OF KNOWLEDGE

S. 1134 makes a person liable for statements or claims which that person knows or has reason to know are false, fictitious, or fraudulent. §§802(a)(1) and (2). The bill defines "reason to know" as acting in "gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement." §801(a)(6). S. 1134 thus incorporates a negligence standard which is not the prevailing standard in case law developed under the False Claims Act.

The clearly predominant view among the circuit courts of appeal is that the Government must show actual knowledge of falsity. *See*, *e.g.*, *United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978); *United States v. Ekelman & Assoc.*, 532 F.2d 545 (6th Cir. 1976); *United States v. Children's Shelter, Inc.*, 604 F. Supp. 865 (W.D. Okla. 1985); and *United States v. DiBona*, 614 F. Supp. 40 (E.D. Pa. 1984)(noting that five of eleven circuits have held that the Government must show that the defendant knew the claims to be false). At least two other circuits require not only actual knowledge of falsity, but also specific intent to defraud the Government. *See* *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970); *United States v. Thomas*, 709 F.2d 968 (5th Cir. 1983).

As part of its justification for a negligence standard, the Governmental Affairs Committee cites the decision of the Eighth Circuit in United States v. Cooperative Grain and Supply Company, 476 F.2d 47 (1973). In that case, the Court held that extreme carelessness or recklessness could constitute sufficient knowledge or intent to establish liability under the False Claims Act. No other circuit, however, has adopted this interpretation of the FCA. Moreover, a generous reading of Cooperative Grain is required to find support for the negligence standard currently contained in S. 1134.

The bill clearly goes beyond the language of Cooperative Grain concerning extreme carelessness and reckless disregard for the truth to impose a duty on a claimant or person making a statement to conduct a "reasonable and prudent" inquiry to determine the truth of the claim or statement. As the Public Contract Law Section of the American Bar Association pointed out in its report dated February 14, 1986, on the standard of knowledge under S. 1134, the inclusion of a duty of inquiry shifts the focus from the defendant's actual state of mind to whether he complied with the conduct expected of a hypothetical reasonable and prudent person. This presents the possibility that a person acting in a good faith belief that his claim or statement was accurate could nevertheless be found liable under the Program Fraud bill because he failed to make a reasonable inquiry to determine whether the claim or statement was indeed accurate.

In light of the significant penalties provided for in the bill, the fact that actions for fraud have traditionally required some showing of knowledge of falsity, and the significant diminution of procedural protections under the bill, the standard of knowledge currently found in S. 1134 would appear inappropriate. It seems more proper, under these circumstances, for the standard of knowledge to focus on the defendant's state of mind and to require some showing of actual knowledge of falsity or deliberate action on the part of the defendant.

COVERAGE OF STATEMENTS UNRELATED TO CLAIMS

S. 1134 makes a person liable for false, fictitious or fraudulent statements, made to the Government or to intermediaries, that are unrelated to any claim. §802(a)(2). This is an extremely broad provision and, as the Governmental Affairs Committee Report acknowledges, represents a change from existing law. There is currently no civil penalty for false statements unrelated to a claim. There is only a criminal statute, 18 U.S.C. §1001, covering such behavior. Unlike S. 1134, however, the criminal statute does not cover statements negligently made. Also, the criminal statute requires a higher standard of proof to establish culpability. The coverage of statements made to intermediaries, rather than directly to the agency, is also troublesome and will be difficult for a corporation to monitor. This is of concern because the Report makes clear that a corporation will be held liable for the "collective knowledge" of its employees under the doctrine of *respondeat superior*. *Report* at 22.

Moreover, §802(a)(2) permits the imposition of penalties for the making of such statements without any requirement that the Government have suffered any loss or damage. To the extent that S. 1134 provides for penalties for activities resulting in no loss to the Government, the bill looks increasingly like a penal statute rather than the remedial statute which it is intended to be.

NO REQUIREMENT THAT THE GOVERNMENT PROVE DAMAGE TO RECOVER

The False Claims Act currently provides that a person is liable for a civil penalty of $2,000 plus an amount equal to twice the amount of damages the Government sustains "because of the act of that person." 31 U.S.C. §3729. Thus, under the FCA, in order to recover double penalties, there must be some causal connection between the false or fraudulent activity of the defendant and the damages sustained by the Government. See United States v. Miller, 645 F.2d 473 (5th Cir. 1981) (Government must demonstrate element of causation between false statements and loss; in federal housing case, Government must show that false statements in the application were the cause of subsequent defaults).

Section §802(a)(1) does not include such an element of causation. The bill provides for an assessment, "in lieu of damages sustained by the United States because of such claims," of not more than twice the amount of such claim, or portion of the claim, determined to be false or fraudulent. A person may therefore be held liable for a double assessment regardless of whether his false or fraudulent claims, or statements related thereto, caused any damage or harm to the Government. This is in significant contrast to existing law under the FCA, and completely eliminates the Government's burden of proof in this area. Furthermore, under the bill, there is no requirement that there be a causal connection between a person's false or fraudulent activities and any damage to the Government in order to impose civil penalties of up to $10,000 for each claim or statement.

As with coverage of false statements causing no loss to the Government, the absence of requirements that the Government prove its damages, and prove that the defendant's activities caused those damages, makes S. 1134 look increasingly like a penal, rather than a remedial, statute. Moreover, the substantial civil penalty of $10,000 for each false claim or statement, in addition to the $2,000 penalty already available under the FCA, contributes to this impression. Nevertheless, S. 1134 does not provide the procedural protections normally afforded in criminal proceedings.

"PREPONDERANCE OF THE EVIDENCE" STANDARD OF PROOF

Section 803(e) of the bill provides that a determination of liability shall be based on the preponderance of the evidence. Although the Governmental Affairs Committee Report cites one case suggesting that this is the appropriate standard of proof under the FCA, *Report* at 16, the circuit courts of appeal are split on this issue, with several courts requiring clear and convincing evidence of fraud. At least the Second, Sixth, and Ninth Circuits have chosen some version of the clear and convincing burden of proof. *See*, *e.g.*, *United States v. Milton*, 602 F.2d 231, 233 (9th Cir. 1979); *United States v. Ekelman & Assoc., Inc.* 532 F.2d 545, 548 (6th Cir. 1976); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 101 (2nd Cir. 1971). Moreover, clear and convincing evidence is normally the standard of proof in civil fraud cases between private parties. *See*, *e.g.*, *Davis v. Upton*, 250 S.C. 288, 157 S.E.2d 567 (1967).

The higher standard of proof appears more appropriate here since cases under the bill will often involve allegations of fraud that have historically required clear and convincing evidence to establish liability. Also, requiring a higher standard of proof would provide some counterbalance to the loss of procedural protections that occurs when cases are litigated before an administrative agency. The elevated standard of proof would also provide some assurance that the severe penalties available under S. 1134 would not be improperly imposed.

SUBPOENA AUTHORITY

One of the most disturbing and potentially far-reaching features of S. 1134 is the subpoena authority given to the agency's investigating official. That official would have authority to require production of "all information," including documents, reports, answers, records, accounts, papers and data "not otherwise reasonably available to the authority." §804(a)(1)(B). There is no statutory requirement that the information requested be relevant or material to the ongoing investigation or that consideration be given to the burden being placed on the respondent. Thus, the door is opened for an agency to conduct whatever "fishing expeditions" it wishes to conduct.

Even more significant is the fact that each statutory Inspector General is authorized to subpoena the attendance and testimony of witnesses. §804(a)(2). Again, there is no requirement that the information sought be relevant and material to the investigation, just that it be "necessary" to the conduct of the investigation. Moreover, there is no indication of whether such testimony could be discovered by the accused if an action is brought.

The grant of investigatory testimonial subpoena power is highly unusual as illustrated by the fact that the Justice Department does not currently have such authority in civil fraud cases, nor does the FBI have such authority. Despite the fact that it may disapprove the issuance of such a subpoena, the Department of Justice is opposed to the Inspectors General being given that authority. The Department has stated that there is no demonstrable justification for such extraordinary powers. It has also pointed out that this broad authority creates a potential for interference with ongoing criminal investigations and has expressed the fear that the procedures for review by the Department are unworkable. See Letter from Phillip D. Brady, Acting Assistant Attorney General, to Senator William S. Cohen (November 4, 1985), reprinted in Report at 36-7.

Furthermore, the bill provides no satisfactory review mechanism either for the issuance of a subpoena duces tecum or for a testimonial subpoena. With regard to the former, there is no review either at the agency level or by the Department of Justice. The Justice Department does have some review authority for the issuance of an investigatory testimonial subpoena, but the bill does not require affirmative approval by the Department. Such a subpoena may be issued if the Department simply fails to take action for forty-five days after receipt of notice from an Inspector General. With regard to review by a federal court, the bill provides that, in the case of contumacy or refusal to obey a subpoena, the Justice Department may seek enforcement in federal district court. There is no concomitant right, however, given to the defendant to bring an action in federal court to quash a subpoena issued by an investigating official or Inspector General.

DISCOVERY

In stark contrast to the sweeping investigatory authority given to the Government, S. 1134 permits discovery by the defendant "only to the extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues." §803(f)(3)(B)(ii). While the bill provides that discovery shall not be denied "unreasonably", this requirement fails to counteract the very broad discretion given to the hearing examiner to determine what discovery should be permitted. Moreover, the legislative history of S. 1134 provides little assurance that discovery will be adequate. The Governmental Affairs Committee Report states that, in "ordinary" cases, "timely exchange of exhibits, witness lists and witness statements will constitute sufficient discovery." Report at 15.

This obviously falls far short of the discovery rights available in federal court and hardly seems adequate or fair in light of the Government's opportunity to investigate and develop its case prior to the hearing through the use of its subpoena power. Moreover, discovery of certain documents, such as the notice sent by the reviewing official to the Justice Department that the official intends to refer a case to a hearing examiner, is specifically prohibited. Also, it is unclear whether the term "witness statements" would include statements taken by the Government pursuant to its testimonial subpoena power.

Finally, there is no immediate recourse if discovery is unreasonably denied by a hearing examiner. While a denial of discovery might eventually be challenged in a court of appeals on due process grounds, it seems preferable to provide some limited review, at least within the agency, to prevent abuses.

$100,000 JURISDICTIONAL LIMIT

Section 803(c) provides that no allegations of liability shall be referred to a hearing examiner if the reviewing official determines that the claim involves a monetary amount in excess of $100,000 or property or services valued at over $100,000. Since §803(c) by its terms applies to claims over this amount, it is unclear whether this "jurisdictional" requirement applies to statements unrelated to claims. Furthermore, the determination of whether an amount in excess of $100,000 is involved is subject to little review. The Justice Department does not review the agency's file, but instead receives a summary prepared by the reviewing official. Despite its obvious importance, judicial review of this determination is precluded by §805(a)(1). Also, varying results may obviously be achieved depending on which claims an agency determines are related and should be aggregated toward the $100,000 limit.

Finally, it is clear that a person's ultimate liability may far exceed $100,000 once the amount of the claim is doubled and civil penalties are added. Thus, very substantial penalties may be imposed on a person who has only had the opportunity to litigate before an administrative agency.

"ADEQUATE" EVIDENCE TO REFER CASE TO DOJ

S. 1134 provides that, if the reviewing official determines there is "adequate" evidence to believe that a person is liable under §802, the reviewing official shall transmit to the Department of Justice a written notice of the official's intention to refer the allegations to a hearing examiner. This notice must include a statement of the reasons for referring the allegations, a statement of the supporting evidence, a description of the claims or statements, an estimate of the amount of money or the value of services or property involved, and a statement of any exculpatory or mitigating circumstances. §803(a)(2).

There are several problems with this provision. First, the term "adequate evidence" is an unfamiliar legal term and is not defined in the bill. Second, it is questionable whether the Department will be able to provide effective review of the agency's determination of adequate evidence. The Department does not receive the agency's file on the investigation, but rather a summary of the case prepared by the reviewing official. Moreover, the referral of the case to a hearing examiner takes place automatically if the Justice Department fails to take action within ninety days. Finally, judicial review of an reviewing official's determination of adequate evidence is specifically prohibited. §805(a)(1).

PROCEDURAL PROTECTIONS COMMITTED TO THE DISCRETION OF THE HEARING EXAMINER

Several key procedural protections provided for in the bill are committed to the hearing examiner's discretion. As noted earlier, the extent of discovery permitted is entirely within the discretion of the hearing examiner. The opportunity for the defendant to submit facts and arguments, among other things, is also basically within the discretion of the hearing examiner since the examiner determines "when time, the nature of the hearing, and the public interest permit" such submission. §803(f)(2)(B). The hearing examiner also determines, subject to agency regulations, whether a particular line of cross-examination is "required for a full and true disclosure of the facts." §803(f)(2)(E). While an egregious denial of these procedural protections may ultimately be reviewable in a court of appeals on due process grounds, other determinations by a hearing examiner not rising to the level of a due process violation may have a very detrimental impact on the presentation of a person's case.

EVIDENCE ADMISSIBLE AT THE HEARING

S. 1134 does not address the admissibility of evidence at the hearing. It is generally recognized, however, that the Federal Rules of Evidence do not apply in administrative proceedings. Thus, for example, hearsay is admissible in an administrative hearing and may provide the substantial evidence upon which the hearing examiner's decision is based. See Johnson v. United States, 628 F.2d 187 (D.C. Cir. 1980).

VENUE

Under §803(f)(4), the hearing must be held in the judicial district in which the person resides or does business, in the judicial district in which the claim or statement was made or presented, or in such other place agreed to by the hearing examiner and the person. This provision presents the possibility that cases may often be brought in the District of Columbia if the mere submission of a claim or statement to an agency located in Washington, D.C., would constitute the making or presenting of a claim there. It is important to keep in mind that S. 1134 covers persons such as students applying for federal loans or individuals seeking federal employment. To allow the hearing to be held in Washington, D.C., may effectively deny many individuals their right to a hearing. Since S. 1134 purports to cover only small cases, it would seem more appropriate to require that the hearing be held in the judicial district in which the person resides or does business.

CONCLUSION

The Program Fraud Civil Remedies Act of 1985 is meant by its proponents to be a "mini False Claims Act" that simply provides a mechanism for adjudicating certain cases which the Department of Justice often declines to prosecute because the expense of litigation frequently exceeds the amount of the claim. The Governmental Affairs Committee Report states that S. 1134 "is intended to capture only conduct already prohibited by federal criminal and civil statutes which could be litigated in federal court but is not." Report at 10. This statement fails to adequately describe the sweeping changes in existing law that S. 1134 would make.

As explained above, the bill makes very significant changes in the scope of liability and burden of proof. Under the knowledge standard of the bill, for example, persons acting in good faith, who would not have been liable under the existing False Claims Act, may now have administrative proceedings brought against them. Also, the Government is no longer required to prove that it has suffered any damage as a result of a defendant's false or fraudulent claim. Nor is the Government required to prove its case by clear and convincing evidence. Certain activities which, until now, have only been prosecuted criminally -- for example, the making of false statements resulting in no loss to the Government -- may now be the subject of a civil action.

These changes in liability and the Government's burden of proof are of even greater concern when coupled with the significant decrease in procedural protections that will result from adjudication of such cases in an administrative forum. No longer will a defendant be able to present his case to an Article III judge, whose independence and impartiality are protected by the Constitution; nor will he be afforded a trial by jury. He will instead be forced to litigate his case before an agency hearing examiner who is not bound by the provisions of the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, or the Federal Rules of Evidence. Moreover, he may very well be required to litigate his case having been afforded little or no discovery, while the agency will have had extensive opportunity to develop its case through its newly granted investigatory subpoena powers.

In addition to expanding liability, significantly decreasing the Government's burden of proof, and substantially lessening procedural protections, S. 1134 also provides stiff penalties for violation of its provisions. A $10,000 penalty for each false, fictitious, or fraudulent claim or statement is superimposed on the present penalty of $2,000 under the False Claims Act. Also, the accused is no longer liable for twice the damages sustained by the Government, but for twice the amount of the entire claim or portion of the claim determined to be false. Finally, all of these changes are triggered by an agency determination -- judicial review of which is specifically prohibited -- that an amount of less than $100,000 is involved. S. 1134, albeit well intentioned, has the anomalous result of affording greater procedural protections and narrower liability to persons accused of defrauding the Government of substantial amounts of money, while denying those same protections to those whose wrongdoing is less serious.

Senator **Hatch**. Thank you, Judge Sneeden. We will put that all in the record and we appreciate your comments here today.

Mr. Creighton, why do we not finish with you.

Mr. **Creighton**. Thank you, Mr. Chairman.

Senator **Hatch**. Let me say this, Judge. I am going to submit questions to you in writing and I would like you to take the time to answer them and give them back to me.

Mr. **Sneeden**. I will respond to those, Senator.

Senator **Hatch**. Fine. I will do the same for you, Mr. Creighton, so there is no reason for you to stay if you like. I would like to just save you that time.

Mr. **Creighton**. Thank you very much.

Senator **Hatch**. We appreciate you being here.

[The questions of Senator Hatch follow:]

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

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RANDALL R. RADER, CHIEF COUNSEL AND STAFF DIRECTOR

July 3, 1986

Joseph Creighton
National Association of Manufacturers

Dear Joe:

As indicated in the Commiteee's hearing on June 17, 1986, concerning S. 1134, false claims and fraud legislation, I would appreciate your written responses to the attached questions. Please return your answers to the Committee in 212 Senate Dirksen Office Building, Washington, D.C. 20510 not later than the close of business on July 15, 1986 . If you have any questions please contact Jean Leavitt at (202) 224-8191.

QUESTION 1): In your testimony, you raise a concern about the subpoena authority provided in the Program Fraud Civil Remedies Act. Under S. 1134, the agency's inspector general may compel personal appearance and testimony without notifying the subject of the subpoena of the nature of the questioning or the purpose of the investigation. The person subpoenaed is not even given notice that he may be accused of wrongdoing. In addition to concerns for the lack of Due Process protections for the subject, there are concerns that it has not been made clear why governmental agencies in civil proceedings should be entitled to benefits not available to ordinary civil litigants, particularly when the inspector general already has very broad powers of investigation under current law. Can you explain more specifically your concerns as to how this authority could be abused by the investigating agency?

QUESTION 2): As you know, the courts today are split among three different views of the appropriate standard of knowledge or intent for fraud actions, varying from a "constructive knowledge" test, adopted only by the eighth circuit, to actual knowledge with specific intent to defraud the United States, a position held by the fifth and ninth circuits. The majority of circuits rejected both of these positions and have adopted the view that proof of actual knowledge is required but specific intent to defraud the United States is not. I have concerns that both S. 1134 and S. 1652, contain a very liberal gross negligence standard. The American Bar Association and others have recommended a definition of knowledge which includes actual knowledge, deliberate ingnorance and reckless disregard for the truth. In your view, what is the appropriate knowledge standard for actions for fraud?

QUESTION 3): I am concerned that the Program Fraud Civil Remedies Act places the accused at a disadvantage with regard to the right to discovery when compared to the protections afforded him during a civil trial. Under S. 1134, the accused has a right to discovery only to the "extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair and reasonable consideration of the issues." Under this "expeditious hearing" standard, the accused could be denied the right to obtain copies of transcripts taken pursuant to the testimonial subpoena of the witnesses or to documents subpoenaed. In your testimony you also express concerns as to the lack of discovery protection under S. 1134. What is an appropriate standard for discovery within an administrative proceeding alleging fraud?

Thank you for your willingness to answer these questions. With kindest regards and best wishes,

Sincerely,

Orrin G. Hatch
Chairman
Subcommittee on the Constitution

OGH:sgl

HARRIS

JOSEPH R. CREIGHTON
VICE PRESIDENT
SENIOR LEGAL ADVISOR

July 24, 1986

The Honorable Orrin G. Hatch
The United States Senate
Committee on the Judiciary
212 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Hatch:

Thank you for your letter of July 3, 1986, asking for my comments on three questions. Unfortunately, the letter did not reach Harris Corporation until Monday, July 21, so my response cannot meet the July 15 deadline.

The three questions deal with three very important issues out of the many raised in the NAM statement. These issues illustrate the larger problem that the fundamental purpose of this legislation is to facilitate prosecutions and to curtail the present right of accused persons to be tried in court under normal procedural rules. Although the purpose of combatting fraud and simplifying procedures is laudable, we doubt if it is really necessary to achieve the goal by this limitation of personal rights which are guaranteed by the Constitution and have been traditionally observed.

Question 1.

I appreciate your concern about possible abuse of the testimonial subpoena. Your question implicitly asks me to justify the right of individuals to be free of governmental intrusion into their privacy unless I can demonstrate that the intrusion will be abused. I suggest that the real question is, if the Inspector General of an agency already has very broad powers of investigation, why is it necessary to confer additional powers beyond those possessed by the Justice Department?

Anyone who has experience with any government investigation knows that it goes on and on. Power feeds on itself. Prosecutors have a job to do, and good ones want desperately to succeed. If they have the right to ask anyone and everyone any question they want to ask with no question of need and no standard of relevance, many will do it. Our law now gives citizens some protections, which, in fact, are already quite limited. Nevertheless, at present, prosecutors cannot call individuals in for personal interrogation except in grand jury proceedings where protective rules apply. The purpose of S.1134 is to give federal investigators even more rights, and to allow citizens even fewer protections. The legislative record is devoid of any basis for doing that, except for the argument that conviction will be easier and cheaper. That should not be a sufficient justification for either the Senate or this Administration.

HARRIS CORPORATION CORPORATE HEADQUARTERS MELBOURNE, FLORIDA 32919 TELEPHONE 305-727-9100

My specific comment about "benefits not available to ordinary civil litigants" was intended to make it clear what S.1134, as well as S.1562, really do, and what the arguments for them really mean. That boils down to saying that court cases take too long, are too expensive, and are inconvenient for the Justice Department. However, the real problem is that all litigation is expensive, time consuming and frustrating. The federal government now seeks to help itself by legislating special rules for itself to make it easier for it to win. This is done, first, by making it easier for the government to get the facts. Then it can try the cases before its own hearing officers, rather than in court. Finally, it can apply its own procedural rules rather than the Federal Rules of Civil Procedure. All of these changes simplify the case for the government only. The rest of us still have the problem of expensive litigation, and when we litigate with the government, we are put at a greater disadvantage than already exists. If the Congress really wants less expensive justice, the solution is not S.1134. It is a simplified procedure to try these cases fairly.

Question 2.

The problem in devising an appropriate "knowledge" or "intent" standard is that, if a conviction is to be allowed without proof of actual knowledge or intent to defraud, the lesser standard of proof should be different for different situations. For example, "intent" and "knowledge" can be possessed only by people, not by legal entities. When applied to any organization, such as a charitable organization or corporation, any knowledge they have is merely knowledge of someone in the organization. To impute that knowledge to the entity as a whole, or to charge other persons in the organization with such knowledge, several questions must be examined:

(1) Did any person know?
(2) If so, who? Was it a person in management?
(3) Was there a duty to tell someone else?
(4) Was there a duty to investigate further based on what was known?
(5) Should management have established preventive procedures?
(6) Should management urge employees to "tattle" on other employees?
(7) Does every manager have a duty to interrogate subordinates, superiors or associates before taking any action in reliance upon their statements?

Even for individuals, although the issue is simpler, culpability for knowledge should depend upon the circumstances, such as whether the individual was an employee in a sophisticated company, a welfare recipient, a doctor, or whatever.

The courts have been dealing with this issue in a relatively successful manner because it is done always case by case, where variations can be taken into account. That offends those seeking uniformity and is viewed as a problem by prosecutors whose success is measured by the number of convictions they can get. But the court decisions as to actual knowledge have in recent years reached reasonable results, even though the language of the judicial opinions may vary. For example, they have given short shrift to defendants who stick their heads in the sand to avoid knowing. That is because--as to businesses at least--the issues are not in fact actual knowledge or intent, but whether the organization or a person who has no actual knowledge should be held accountable.

I have examined the legislative history of S.1134 and S.1562 and find no real evidence indicating there is any need for a change or any real understanding of these issues. Instead the record contains unsupported testimony by prosecutors and federal officials who say they have a problem. It seems to me that the ABA has simply recognized that, if some amplification is demanded, the proposed definition incorporating "reckless disregard" comes reasonably close. It is hoped that this legislative formulization will allow justice to prevail in actual cases.

Question 3.

S.1134 establishes a detailed series of procedural rules, including a limitation on the right of discovery by accused persons. At the same time, the government's rights of investigation are to be drastically increased. No one has given any reason for not using normal civil procedure rules for discovery, the rules of evidence or other procedural matters. That possibility is not even discussed in the Committee Report. Also, no reasons have been offered for putting limits on the right of discovery, as far as I can discover. Certainly the right should not be curtailed simply to expedite the hearing, as S.1134 now contemplates. If S.1134 is a "civil" proceeding, then normal civil discovery rules should be made applicable.

Although your question refers only to the need for balanced discovery rights, the problem is not limited to discovery. Most of the generally accepted rules applicable to civil litigation are also dispensed with or greatly modified by S.1134. The "hearsay rule" and all the other rules of evidence for civil proceedings go out the window because the Federal Rules of Civil Procedure do not apply. What is the justification for doing that? If accused citizens are to be tried without the benefit of the protections afforded in criminal proceedings merely because S.1134 is termed "civil" in nature, then why not at least allow them the rights of civil litigants?

Perhaps it would be useful to consider a possible example. At an administrative hearing, the citizen accused of fraud against a federal agency will likely be faced by witnesses from the agency. These government witnesses can give hearsay evidence of things they have heard from other agency employees. If conflicts in the testimony develop, who really thinks that the agency's hearing officer will believe the accused citizen against the agency witness? What valid reason can there be for not giving the defendant the protection of civil rules of evidence? Administrative convenience cannot justify such a denial of ordinary civil litigation rights.

In conclusion, let me express our appreciation for your interest in this matter. As the NAM statement indicates, the issues to which your questions relate are only symptoms of broader problems with this legislation. Substituting trial by the accusatory agency in its own tribunal for a proper court trial is the real problem.

Very truly yours,

Joseph R. Creighton

/md

Senator HATCH. Mr. Creighton.

STATEMENT OF JOSEPH R. CREIGHTON

Mr. CREIGHTON. Obviously, NAM favors the objectives of S. 1134. What we are questioning is the means both on policy grounds and also raising constitutional questions, and I think we would reiterate, particularly for our smaller members and the employees in the various companies and citizens, obviously the general public we do not represent, that for a Supreme Court to decide constitutionality 10 years after all of us have lived under a statute is hardly what we would call private citizens' rights, and we would urge the Congress not to extend Federal power to its absolute limits. We do not think that is what this administration and this Congress has stood for, and I think we can demonstrate—we may not be able to show that the statute is unconstitutional, but we can show it goes beyond any of the decisions today.

First, it is new. I would say with regard to Senator Cohen's comment, the false statement part is new except in the criminal law. I would submit that if you remove criminal defenses and court proceedings from a determination as to whether somebody has committed an offense, you will in fact find people guilty in cases where they were not found guilty before. That in my view is a new offense.

We think this is new not only because there is no jury trial and no court trial, there are no rules of evidence, there is no hearsay rule, there is no right of discovery. This bill, to anyone looking at it, looks criminal, but if it is not criminal and it is deemed civil in order to avoid the rules of criminal procedure, then, instead of being civil and civil means that when I go to court, both sides have rights of discovery, the rules of evidence apply, there is a judicial review court or jury, depending with the rules that apply.

This bill eliminates all of those in an adversary proceeding between an agency and a citizen. It eliminates all of the civil requirements and puts in their stead the Administrative Procedure Act. The Administrative Procedure Act was not designed for adversary proceedings of the normal civil sort.

In almost all of the constitutional cases that are cited, almost all of the policies and almost all the precedents are administrative proceedings. I do not believe that prosecuting individual employees of our companies and small business people by the agency that they have a dispute with is a proper administrative proceeding. As Judge Sneeden pointed out, the *Atlas Roofing* case and all of the cases cited on the seventh amendment, the remedies provided were an integral part of the regulatory process. They were not applied, as S. 1134 does, across the board to all Federal—not only administrative agencies but executive departments. The executive departments are carrying out some arcane, old fashioned rule, Customs, everybody else.

I believe it is unprecedented to say that those agencies have a right to decide their adversary proceed:ings with the people they deal with in their own court, eliminating not only a jury trial but a court trial, and all the rest.

Now, we would concede that a simple administrative remedy would be desirable. We would like it to be both ways. I would just like to point out one thing about CMPL. It is not a precedent. One, the standard of knowledge is not the same.

The standard of knowledge there does not apply to false claims as such. It applies only to knowledge, the question of knowledge as to whether the services you billed for were performed. Well, it is no great step to say that if you bill somebody for doing something, you ought to know whether it is done.

There is no testimonial subpoena in CMPL. It does not apply to false statements, only to claims, and the average size of the cases, using Senator Cohen's testimony, is $144,000. They are not small claims. They are being applied in big claims. It is not a precedent.

I would add only that the Department of Justice in other testimony has warned that increasing the penalties and using punishment and retribution as your purpose raises another constitutional issue, that is, we have three: One, the article III courts, the seventh amendment, a question which we have discussed in our statement, and the third is the fact that when you make the penalties larger and the purpose is punishment and retribution, the cases cited in the committee report do not go as far as this.

So we would submit that what this does that is new is giving every executive branch administrative agency the right to try people in adversary proceedings on their own in a suit between the Government and the individual in their own courts without application of even the civil rights of procedure.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Creighton follows:]

TESTIMONY
OF
JOSEPH R. CREIGHTON
ON BEHALF OF
NATIONAL ASSOCIATION OF MANUFACTURERS
GIVEN BEFORE
THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE
ON S.1134
THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1985

My name is Joseph R. Creighton, Vice President-Senior Legal Advisor of Harris Corporation. I am here in my capacity as Chairman of the Administrative Remedies Task Force for the National Association of Manufacturers. NAM is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ 85% of all workers in manufacturing and produce 80% of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Association's Council and National Industrial Council.

Because the membership of the NAM is representative of all types of manufacturers, we believe we can offer a unique perspective on the issues raised by S.1134, The Program Fraud Civil Remedies Act. NAM and its members are certainly as concerned as is the government about possible fraud directed against the government. We support the stated objectives of S.1134, not only on moral grounds but also because all taxpayers, corporate and individual, are the ultimate losers.

At the same time, any legislation which can result in charges against individuals and corporations and ultimate fines up to $100,000, and perhaps more, must be examined carefully as to the impact upon both individuals and businesses. It must preserve constitutional rights and be consistent with due process of law. S.1134 could have broad impact upon individuals, but as a representative of businesses, NAM's comments here will be directed only at the possible impact upon business organizations and the effect the legislation will have upon individual employees.

Although S.1134, coupled with other pending legislation dealing with false claims, has been discussed extensively in connection with large defense contractors, NAM's due process concerns relate to the vast number of smaller businesses which are not primarily engaged in contracting with the federal government or are primarily smaller subcontractors under government programs, and also to those who have only tangential relationships with federally funded programs. Since S.1134 for the first time seeks to extend federal fraud statutes to cover businesses and individuals who may have no direct contractual relationship with the federal government, their relationship with a federal agency and that agency's power over them must be examined in an entirely different context from that applying in a major defense contract. These companies and their employees have not agreed by contract to submit to factual determinations by a government agency or its Board of Contract Appeals. That is also true for the employees of government contractors. As it appears to us, there is no reason to subject such businesses and individuals to any rules, or to deny them any procedural or substantive rights, which are different from those applicable in normal criminal or civil litigation between private parties. In other words, the principles of due process do not permit the federal government, in its sovereign capacity, to impose upon individuals who have not contracted with it a lesser level of civil rights and procedural protections than the law generally requires.

Due process and constitutionality, we submit, are not solely matters for the Judiciary. The legislative branch has equal responsibility. These issues are not resolved merely because of a legal opinion that the Supreme Court would not strike down the legislation. The Court defers to the other branches of government where possible, avoids consideration of constitutional issues unless it is absolutely necessary to decide them, and holds a law valid if any rational basis for its validity can be found. Thus, the Congress makes the initial decision. That decision will be final as to most citizens who will have neither the inclination nor the resources to challenge it.

In this light, we say that S.1134 goes too far, particularly if S.1562 were also to be enacted amending the Civil False Claims Act. It cannot be disputed that the bill goes beyond any of the court decisions cited to support it. Some of these decisions uphold a specific procedure in a specific administrative context. None combined all these features, nor did the decisions purport to validate the specific remedy or procedure in a different context from that in which the case was decided. Because S.1134 invades new ground, we ask this Committee to review carefully its potential effects on the rights of citizens, as well as the true applicability of the claimed precedents.

We believe the bill proposes to go beyond existing law and to limit individual rights in several important respects. We point to the following "firsts."

1. Businesses and individuals may be subjected to a federal agency's procedures even though they have entered into no contract directly with the agency and have not received any grant or loan from the federal government. Although federal funds must be involved before the statute would apply, if an allegedly false statement is made by an independent third party in connection with a federally funded program, that party is subject to the agency's broad investigatory and penal powers. Also, employees of businesses which deal with the government can be personally subjected to the agency's procedures, and fined personally, even though they have never agreed to waive any of their normal rights to a court or jury trial.

2. For the first time, we believe, mere statements, unaccompanied by any claim against the government, or payment or loss by the government, can be the subject of fines assessed by a federal agency outside of any court proceedings. Note that the proposed statute does not apply only to written statements. Oral conversations and statements over the telephone would also be covered. All conversations in connection with marketing efforts, negotiations, audits, engineering discussions, settlements and about everything else would be subject to this law, however casual they might have been. In such a case, the exact wording of the statement, its context, and a reasonable interpretation of it will be provable only by testimony of witnesses, rather than by a clear written statement of the accused or the text of a document or claim submitted to the government, or by a payment by the government. These can of course be objectively substantiated in a manner not possible for oral and telephonic conversations.

3. The federal government's right to compel a witness to appear and personally testify prior to the filing of any charges or the initiation of any litigation is established here for the first time in civil proceedings, as far as we are able to ascertain. Although such personal testimony can be required by a grand jury, the results cannot normally be utilized by the government in

subsequent civil proceedings; and in criminal proceedings, the accused has all the constitutional rights which normally apply. The Senate Judiciary Committee in considering the companion legislation amending the Civil False Claims Act, S.1562, specifically rejected a proposal to allow the results of grand jury proceedings to be utilized in subsequent civil proceedings. There is no basis for a grant of even broader rights to federal agencies and executive departments generally.

4. In contrast with the prevailing rule of burden of proof in civil false claims proceedings, the government's rights would be increased and the rights of the accused diminished by changing the standard from "clear and convincing evidence" to "preponderance of the evidence." This is a particular problem when a new standard of knowledge is proposed, when mere oral statements can be the subject of the accusation, and where the judgment is made by employees of the charging agency rather than any court of law.

5. A new concept of fraud is introduced by S.1134 which specifically eliminates any requirement of intent to deceive or defraud the government or any requirement that the accused has made a claim against the government or received any money payment or any benefit whatsoever from the statement in question.

The application of these new rules must be examined carefully under constitutional and due process principles. Although the precise rights of accused persons may depend upon whether a proceeding is deemed to be civil or criminal, the requirements of due process apply even to civil proceedings. Moreover, the difference between "civil" and "criminal" is more than just a label which can be applied either way by the Congress. A fine of $100,000 is certainly penal in character, whatever its claimed justification and regardless of whether or not other fines have previously been deemed by the courts to be non-criminal. In our view, the rights of a defendant to both procedural and substantive due process do not depend solely upon that designation.

If the proceedings are civil, NAM believes that a person accused of wrongdoing should, as a minimum, have the same procedural rights and protections as apply in normal civil proceedings. Although the Report of the Senate Committee on Governmental Affairs on S.1134. Report 99-212 (the Report), seeks to justify compliance with due process principles by compliance with the Administrative Procedure Act (5 U.S.C. 500, et. seq.) that should not end the investigation. If the accused is charged with fraud, and is not to be accorded the rights of criminal defendants, at the very least, the rights of civil proceedings should apply. These include the rights of deposition and other methods of discovery, for example. Appellate rights should be the same as applicable in other civil proceedings. Regardless of rules which have been developed in administrative proceedings under the procedures of various federal regulatory agencies, any limitations on the rights of the accused with respect to venue, discovery and appeal that are not in accord with the Federal Rules of Civil Procedure must be the subject of close examination by this Subcommittee.

Although NAM has many questions concerning the impact of S.1134, if enacted, upon businesses both large and small, and also upon their many employees, in this statement we are listing those concerns which we believe raise due process issues, as follows:

1. The Agency Inspector General is empowered to compel personal appearances and testimony by anyone, virtually without limitation, and without notifying that person of the subject of the investigation or whether the person may be accused of wrongdoing. There is no requirement of relevance. We believe there is no precedent for such a "Kafkaesque" grant of federal power which can be exercised in civil proceedings before a charge is made or litigation is commenced.

2. Although the witness is permitted to be represented by counsel, the target of the investigation, if there is one, need not be notified that witnesses are being interrogated and, by specific provisions of the statute, has no right to be present or be represented by an attorney - 804 (a)(5)(B). This is in direct contrast to the Federal Rules of Civil Procedure which allow the parties to civil proceedings to be present at all depositions, with the rights of cross-examination. No provision of the statute gives the accused any right, ever, to find out or challenge what a witness might have said in these proceedings.

3. The place for the hearing can be selected by the agency to include the place where a claim or statement "was made, presented or submitted" - 803 (f)(4)(B). In the case of letters or documents transmitted by mail or statements over the telephone, it appears likely that a federal agency located in Washington, D.C., could hold its hearings in Washington even though the accused sent the letter or made the telephone call from the West, the South, or some other part of the country far from the nation's Capital. For small claims and statements not amounting to a claim, that may be most inconvenient for the accused, and perhaps for many of the witnesses which the accused might wish to present. No provision is made similar to "forum non conveniens", and the rules of procedure applicable in the courts would not be available.

4. Contrary to the normal requirement for a hearing, S.1134 grants a hearing only if specifically requested by the charged person within 30 days. Since employees of small businesses and many individuals may not have much familiarity with legal proceedings, and would probably need consultation with an attorney, the possibility of inadvertent forfeiture of the right to a hearing seems substantial. A hearing should be required unless waived in writing by the defendant, after an adequate opportunity to consult with counsel.

5. The prevailing burden of proof requirement applied by the courts under the Civil False Claims Act should be adopted. Even if these administrative procedures are not criminal in nature, they are even more quasi-criminal in their penalties than was the case under these prior federal court decisions.

6. The proposed change in the standard of knowledge which will be applied is particularly disturbing, especially when the statute applies to false statements in the absence of any claim and where the burden of proof is to be reduced. Not only can the accused be fined without any showing of actual knowledge of the falsity of the statement, or any intent to deceive or defraud, but also the Report specifically includes, within the concept of false statement, a series of fully true statements which are deemed to

have been incomplete so that, in the judgment of the hearing examiner, further statements should have been made by the accused to clarify the admittedly true statements to avoid misinterpretation - 802 (a)(2)(B). This is the standard applied under the Securities laws to corporate disclosures. That may be appropriate for large public issuers of securities, but is not the standard of truth which normal citizens live by.

7. A particular danger arises when penalties are assessed on those who admittedly had no actual knowledge but allegedly should have known. It is clear from the committee report, (page 21), that the statutory language of Section 801 (a)(6)(B) concerning the standard of knowledge was intended to impose a "duty to make inquiry." Compliance with this duty is obviously a subject for decision by the hearing officer based upon all the evidence available to the hearing officer after a full investigation. This is a hindsight judgment--after an extensive investigation and examination of documents. At the hearing, such facts may appear far different from the way they looked to the accused at the time of the statement, and with the knowledge then available to him or her. In a business setting, the issue of knowledge always raises two questions: First, who in the company had the knowledge and did that person have enough knowledge or breadth of experience to properly interpret what has come to his attention; and second, whether this knowledge was adequate to cause "red flags" to be raised sufficient to impose some duty to inquire. In addition, the issue always arises as to the extent to which a responsible person must establish procedures or take advance steps to prevent some activity or to find out about it. That judgment is easier to make by hindsight after an event has occurred and other people testify that they knew about it, than it is to anticipate what should have been known and what preventive action should have been taken. Thus, this "duty to inquire" goes far beyond any requirement of knowledge or any reasonable interpretation of what should be called "fraud."

8. Full discovery should be permitted for the accused, including depositions, particularly if broad testimonial subpoena powers are given to the government prior to bringing the case, the

results of which need not be provided to the accused. In spite of this, the statute in Section 803 (f)(3)(B) specifically grants discovery only to the extent that the hearing examiner determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues. The standard of an "expeditious" hearing is not that which civil due process requires.

9. Although the proceedings are termed "civil," rather than "criminal," the procedures are not those available to parties in normal civil proceedings. Two illustrations should suffice to make this clear:

    (a) The accused person's right of cross-examination at the hearing is limited to that which "may be required for a full and true disclosure of the facts." Presumably, the hearing examiner selected by the agency makes a determination as to the scope of cross-examination which will be allowed.

    (b) The rules of evidence which would be applicable in normal civil proceedings, such as the hearsay rule, are presumably not applicable since the entire prosecution, hearing, and penalty procedure is treated as merely administrative.

10. No normal civil right of appeal from the agency's decision is available. Judicial review is allowed only through an appeal to the United States Court of Appeals, which may be very costly and only at a distant place. Moreover, the standard of review is the very limited standard applicable to administrative and regulatory proceedings and does not meet the standards applicable to either civil or criminal proceedings.

11. Cumulative and overlapping remedies can be applied against the accused person, often simultaneously. Existing remedies include:

    (i) Remedies included in the Federal Acquisition Regulations, applicable agency regulations, or the specific contract, such as contractual recovery for allegedly defective pricing;

    (ii) Debarment proceedings or agency threats to utilize them;

    (iii) Criminal false claims prosecution;

    (iv) Criminal prosecution under other statutes;

    and

    (v) Qui tam proceedings initiated by third parties.

12. The pending amendment of the False Claims statute before the Senate (S.1562) goes even further and specifically provides that an agency can proceed with administrative penalties (as provided in S.1134), notwithstanding any proceedings brought under the qui tam provisions of S.1562, whether prosecuted by the government or by the qui tam claimant. There is no provision in either statute for an election between the two remedies if they are applicable to the same transactions, nor is there a prohibition of double recovery. Since the agency proceedings under S.1134 are not judicial proceedings, principles of double jeopardy, res judicata and collateral estoppel would seem not to be available to protect the accused person.

The full Judiciary Committee will soon begin consideration of reforming the Racketeer Influenced Corrupt Organizations Act (RICO). NAM believes that Congress should note the decision of the Supreme Court of the United States in Sedima S.P.R.I. v. Imvex Co., Inc., 473 U.S., 87 L.Ed. 346 (1985), applying literal language which apparently did not carry out the real intent of the Congress for a legislative solution to an urgent problem. RICO was enacted in 1970 with the uncontroversial goal of weeding out organized crime from American businesses. Yet legitimate businesses with absolutely no ties to organized crime have had cases, which otherwise would have been normal civil litigation in state courts, brought within the federal court system and the resulting harsh penalties of RICO merely because of the broad language of the statute. To avoid repetition of this experience, we believe that the legislation before this Subcommittee should be reviewed carefully, with a view to protecting the rights of businesses and individuals, as well as to achieve prevention of fraud. We note that violations of this statute might be predicate acts within the meaning of RICO with somewhat unpredictable additional liabilities for the accused persons.

In this context, we submit that many of the powers proposed to be granted to the federal government by S.1134 go beyond existing precedents or what is required to achieve any of the legitimate purposes of the legislation. Also, the rights of the accused are curtailed for reasons expressed in the Report as necessary to provide efficient enforcement and reduce costs to the government. We would point out that litigation costs today are excessive for all litigants, and we see no reason for the federal government, with all its resources, to have special relief not accorded to less affluent citizens and businesses. A specific example of lack of concern for the rights of accused persons is Section 803(f)(2)(B). This paragraph sets forth a doubtful standard for fairness of hearings when it specifies that the hearing procedures shall provide for the availability to

> "...any person alleged to be liable under Section 802 of this title of opportunities for the submission of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the hearing, and the public interest permit." (emphasis added)

NAM does not understand why the opportunity of the accused for submission of facts, arguments, etc. should be so limited. The limitation of due process rights for the accused is alien to our system of jurisprudence and contrary to tradition. Also, it is difficult to foresee how such a provision will be applied or how its meaning would be interpreted by a court if the opportunity for a court test were available. Although in a wide variety of administrative proceedings it may be reasonable to limit the appearances and submission of evidence by certain parties which may have an interest in the proceedings, we question if the standards of due process are met when that standard of justice is applied to individuals, such as employees of businesses around the country, who may be subjected to fines of $100,000.

NAM's concerns about this legislation go primarily to policy questions, particularly if companion legislation is enacted to broaden the Civil False Claims Act. They are not limited solely to issues of due process and constitutionality. Nevertheless, we would like to direct the attention of the Committee to the constitutional justification for S.1134 as set forth on pages 33 and 34 of the Government Affairs Committee Report. Reliance upon the Supreme Court decision in United States ex rel. Marcus v. Hess 317 U.S. 537 (1943) seems misplaced. As stated by the Court, and summarized briefly on page 34 of the Report, the Civil False Claims Act is a "remedial statute imposing a civil sanction." Its primary purpose is "...to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." Further, the Court said "This remedy does not lose the quality of a civil action because more than the precise amount of so-called 'damage' is recovered."

That seems to us to be a strange justification for a statute which not only increases drastically the total penalty which may be assessed, but is intended by its express terms to apply when the government has suffered no loss whatsoever, and even where the defendant has made no claim against the government. An examination of the Senate Governmental Affairs Committee Report indicates a clear intent to "penalize and deter" (page 4), and it is said that an administrative remedy "would serve as a deterrent against future fraud" (page 6). The supporting testimony at the hearings mentioned that monetary sanctions would be a useful deterrent (page 8). It may not be entirely clear from the precedents exactly how penal in nature a statute must be to qualify as "criminal", so as to provide defendants with rights normally accorded to those accused of crimes. However, the Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), declared unconstitutional the application of a "civil" statute where the intent of Congress was to provide for deterrents and retribution. If the legislation before this Subcommittee is to survive these constitutional tests, the Subcommittee should make necessary revisions to assure its remedial character, and also to assure that there are no penal features of deterrence and retribution which do not comport with the required civil standard.

A significant constitutional issue is also raised by the size of the penalty under S.1134, particularly when viewed in connection with S.1562, the False Claims Reform Act. At the September 17, 1985 hearing on S.1562 before the Subcommittee on Administrative Practices and Procedures of the Senate Judiciary Committee, Justice Department testimony questioned on constitutional grounds the proposed increase of false claims penalties from $2,000 to $10,000. Not only could S.1134 penalties ($10,000 plus double damages) be added to those assessed under S.1562, but also a $10,000 penalty under S.1134 for a reiterated false statement could be $100,000 or more, even when no claim had ever been made by the accused person. Whatever the current opinion of DOJ or constitutional experts may be as to the possibility that these statutes would be declared unconstitutional by the Supreme Court, it is clear that S.1134 would push federal agency power beyond the point which has heretofore been validated by the courts. The issue is--does the Congress wish to do that now, when most of us believe the power of federal agencies have already been pushed too far?

In the view of NAM, these statutes go too far. Nevertheless, it is not the purpose of this statement to provide a comprehensive analysis of court decisions relating to constitutionality. As indicated earlier, we believe the decision of Congress as to constitutionality will, for all practical purposes, be the only one which is relevant to the average person accused under this type of legislation. Moreover, a United States Supreme Court decision on the constitutional issues would be long delayed. Therefore, NAM again urges this Committee to review carefully the judicial precedents which have been cited on behalf of this legislation.

We believe reliance upon these earlier decisions is questionable. In the first place the concept of almost unlimited federal administrative powers originated many years ago with the explosive growth of administrative agencies in the 1930's and 1940's. It is not clear that current judicial authority would in all cases support the extension of federal powers as broadly as previously. The Supreme Court has recently limited the power of Congress to establish so called "legislative courts," or Article I courts, to adjudicate disputes properly within the scope of Article III courts. Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 485 U.S. 50 (1982). As Justice White's dissent states, many Article I courts "go by the name of 'administrative agencies.'" This decision inherently limits the adjudicative power which can be granted to federal agencies. The more recent decision in Thomas v. Union Carbide Agricultural Products Co. 473 U.S.___, 87 L Ed. 2d 409 (1985) does nothing to overrule the principle of Northern Pipeline that there are constitutional limits to the adjudicative powers which may be given to federal administrative agencies. All the Justices in Northern Pipeline recognized that such limits exist. In Thomas, the majority upheld the grant of power, but to do so the court looked at the specific problem which the agency was created to address (87 L. Ed. 2d 413 et seq.), and emphasized that the court's holding was limited to the proposition that matters "closely integrated into a public regulatory scheme" are appropriate for agency resolution (87 L. Ed. 2d 428). In short, there was no blanket delegation of adjudication authority across the board to the whole gamut of administrative and executive branch agencies, as contemplated by S.1134. The Congressional grant of authority was upheld because it was specific to the agency, it was an integral part of the specific regulatory scheme, and it was appropriate for the circumstances. The grant of authority in S.1134 does not meet that standard.

For the same reason, S.1134 contravenes the Seventh Amendment requirement for a jury trial. The Governmental Affairs Committee Report relies for support of S.1134 upon a series of Supreme Court cases dealing with administrative agency decision-making powers, (pages 31-33). In these cases, the statute in question was specific to the agency, not a blanket, government-wide grant as contemplated here. As an example, Justice White's opinion in the primary case relied upon, Atlas Roofing Co., Inc. vs. Occupational Safety & Health Rev. Comm., 430 U.S. 442 (1977) first reviews OSHA and its background, and then states that Congress has often "created new statutory penalties, provided for civil penalties for their violation, and given the agency the function of deciding whether a violation has, in fact, occurred" (430 U.S. at 450). A new statute with appropriate remedies was emphasized (430 U.S. at 453).

This is the thread that ties together the cases which allow nonjury fact-finding by administrative agencies. See other cases cited in the Report at pages 31-33. Several decisions justify elimination of a jury trial because a new, statutory remedy is created, e.g., NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937); Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F 2d 843 (2d. Cir. 1984). In contrast, other decisions have applied the Seventh Amendment to require a jury trial even where a new statuary right was created. E.g., Curtis vs. Loether, 415 U.S. 189 (1974), which held that an action under Title VIII of the Civil Rights Act of 1968 required trial by jury. The court compared Title VIII with Court of Appeals cases under Title VII, where back pay awards without a jury trial were affirmed. The Court noted that the statutory language in Title VII of the 1964 Civil Rights Act calling for affirmative action, including reinstatement and back pay, "contrasts sharply with Section 812's (Title VIII) simple authorization of an action for actual and punitive damages." [parenthesis added]

Although application of the Seventh Amendment by court decisions is confusing, it seems clear that S.1134 goes well beyond the authorities cited for its support. Those cases rely primarily upon the nexus between the statutory scheme under which agencies are given power to regulate and the remedies they may use for investigation and enforcement. Where enforcement and penalties are divorced from that context, as S.1134 proposes, trial by jury should be required.

In summary, the National Association of Manufacturers, on behalf of its membership, supports this Committee's examination into the constitutional and due process requirements of this legislation. NAM fully supports the objective of eliminating fraud and ensuring wise and efficient use of tax monies paid into the national treasury. However, care must be exercised during the legislative process so that normal business procedures are not jeopardized, and that civil liberties and due process rights are not violated. We are certainly willing and available to join in an effort to develop a well-reasoned and balanced approach to the prevention of government program fraud.

This ends my prepared testimony and I am prepared to answer any questions the members of the Committee may have at this time.

Senator HATCH. Thank you, Mr. Creighton. Like I say, we will submit questions to you in writing. Immediately following Senator Thurmond's statement will be my statement and the statement of Senator Grassley, the statement of Senator McClure, and we will also submit questions for Richard Willard, the Assistant Attorney General, and for Richard Kusserow, from the distinguished Senator from Pennsylvania, Senator Specter, who was also here.

So with that, this has been an intriguing hearing, it raises a lot of interesting legal issues and let us see if we can resolve those.

I do have to say that I believe that there is no excuse for the fraud against the Government that has gone on in the past. The seriousness of Government program fraud is well documented. In 1981, for instance, the General Accounting Office documented over 77,000 cases of fraud and other illegal activities reported in 21 agencies over a 3-year period. Now, you know, that fraud has a tremendous impact particularly in light of efforts to trim the burgeoning Federal deficit. However, the establishment of a broad based administrative procedure to punish fraud and false claims has many important implications, some of which, if not most of which have been brought out here today.

So I am very concerned about this bill and we are trying to work to help resolve some of those concerns and I hope we can. There is little or no excuse for some of the fraud that has gone on.

On the other hand, I am concerned about having people branded as defrauders under a system that might be less than a due process system. So let us see where we go from here and, with that, we will recess this committee until further notice.

Thank you.

[Whereupon, at 12:04 p.m., the committee was recessed, subject to the call of the Chair.]

APPENDIX

STATEMENT OF THE
SHIPBUILDERS COUNCIL OF AMERICA
ON S-1134,
THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

I. INTRODUCTION

The Shipbuilders Council of America is pleased to have an opportunity to submit a statement on S-1134, the Program Fraud Civil Remedies Act of 1986. We thank the Committee for requesting our comments, and we hope that our thoughts will assist the Committee in its deliberations.

The Shipbuilders Council of America is a national organization of more than sixty companies, including the principal domestic shipbuilders, ship repairers and suppliers of equipment and services to those industries. A list of the Council's members is attached to this statement. Due to the nature of our products and services, the United States government is one of our major customers. Accordingly, we are concerned that limited federal funds earmarked for the shipbuilding industry not be squandered due to waste, fraud or abuse. However, we also are concerned that in our zeal to apprehend and punish those who submit false claims and statements to the government, we do not retreat from the fundamental principles of due process that are inherent in the American judicial system.

Given these concerns, when this legislation originally was introduced by Senator Roth several years ago, the Council supported the concept that additional measures were necessary to enable the government to effectively and efficiently combat "small" false claims. Although we disagreed with specific provisions of the proposed legislation, at the time we believed that government prosecutors generally did not pursue the perpetrators of small procurement frauds.

This no longer appears to be the case. Statistics released by the Department of Defense Inspector General's Office reveal a significant increase during the last several years in the number of procurement fraud-related criminal prosecutions and the suspension and debarment of government contractors. According to the DOD IG, during the second half of FY 1985 alone, DOD criminal investigations resulted in a total of 502 convictions and indictments and 346 contractors' suspensions and debarments. We believe that examination of the individual cases upon which these statistics are based will reveal that many involve "small" false claims and dollar values. This demonstrates that the laws and remedies presently available to the government are sufficient to counter and deter procurement fraud, including small frauds, if adequate resources are dedicated to the problem.

Therefore, in our view, S-1134 is superfluous and would not enhance the government's ability to obtain legal remedies in small fraud cases. This is particularly true because the provisions of the bill, as presently drafted, are not limited to "small" false claims as originally intended, but rather would apply to claims of unlimited value. In addition, as discussed below, there are a number of critical flaws in the bill which render our constituents unable to support its passage.

II. THE STANDARD OF KNOWLEDGE

When originally introduced, the stated purpose of S-1134 was to create an administrative counterpart to the government's existing false claims remedies. The individuals who introduced the bill and that have supported it have claimed that such an administrative procedure is necessary because the existing judicial processes and their attendant due process safeguards are too costly to permit the government economically to take action against the perpetrators of small procurement related frauds.

However, S-1134 goes far beyond the creation of a new, inexpensive process for the prosecution of small false claims. The bill would lower the standard of knowledge necessary for submission of a false claim, thereby creating new legal obligations for potential defendants and greatly increasing the scope of behavior defined to be illegal. The courts generally have defined the existing False Claims Act to require the government to establish that a defendant had actual knowledge of the falsity of a claim. See, e.g., United States v. Hughes, 585 F.2d 284 (7th Cir. 1978); United States v. Ekelman and Assoc., 532 F.2d 545 (6th Cir.

1976); see also, United States v. Meade, 426 F.2d 118 (9th Cir. 1970) (requiring actual knowledge and specific intent to defraud). Actions arising from mistakes or negligence, therefore, are not actionable under the existing false claims laws.[1]

Section 801(a)(6) of the bill would significantly change existing law by defining the knowing submission of a false claim to include "acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement." Creation of this "duty of inquiry" establishes a new subjective standard that could result in an individual being found to have defrauded the government due to the submission of a claim which he honestly and in good faith believed to be accurate. For example, a company officer who in good faith relies on information provided by his employees may later be found to have defrauded the government if a hearing examiner determines that the officer should have made further inquiry before submitting the claim to the government.

We believe it inappropriate to establish a law that could result in an individual being found to have defrauded the government as a result of mere negligence or a mistake. Accordingly, we urge the Committee to delete the gross negligence standard and to maintain the standard presently found in the False Claims Act if the Committee decides to go forward with this bill.

III. SEPARATION OF FUNCTIONS

The Council is extremely concerned about the lack of separation and isolation of the prosecutorial function from the procurement and investigative functions. Under the proposed system, the investigating official and the reviewing official, whose function is to decide whether the case presented by the investigator should be prosecuted, would be employees of the allegedly defrauded agency. Under these circumstances, the independence of the reviewing authority would be subject to question. Moreover, combining the investigative and review functions in the allegedly defrauded agency would create a great potential for abuse of process by the government. In some instances, the affected agency may attempt to divert public attention from its own mismanagement or inefficiencies by attempting to blame an outside party. In other instances, an agency may succumb to public pressure to find a wrongdoer in response to an embarrassing situation. In these and other situations, it is apparent that the reviewing official employed by an affected agency may not be in a position to exercise the independent judgment necessary for such a sensitive task.

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[1] In United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1978), the court held that facts evincing "constructive knowledge" were sufficient to give rise to a violation of the False Claims Act. However, the court did not find that negligence in and of itself was sufficient to create a violation of the Act.

Under the circumstances, we believe it would be an error for the reviewing authority to be located in the affected agency. Rather, the reviewing authority more appropriately should be the Department of Justice. A Department of Justice attorney who has experience in the criminal process would be in the best position to assess the legal merits of a case independent of any pressures from the investigators or program managers in the agency that allegedly has been defrauded. Accordingly, we would urge the Committee to place this reviewing authority in the Department of Justice. We further would urge that the Department of Justice be required to give its affirmative approval before an agency may proceed with an action under this legislation. To permit an agency to go forward merely because the Department of Justice fails to veto an action would allow a number of prosecutions to be initiated because of the tardiness, overwork or oversight of Department of Justice attorneys.

IV. EXCESSIVE SCOPE

Our third concern is the unnecessarily broad scope of S-1134. As discussed above, the basic premise of this bill is to provide an administrative forum only for those cases where it is not economical to pursue the matter under the normal criminal or civil judicial process. However, the bill, as drafted, would far exceed this limited purpose.

A. Excessive Ceiling

If we are truly concerned only with creating an economical remedy for small false claims cases, we believe that a $50,000 cap would be more appropriate than the $100,000 cap presently included. Based on our experience, we believe that U.S. attorneys generally prosecute claims in excess of $50,000 and have the resources to do so. Claims in excess of this amount should be left to the normal judicial process.

B. No Effective Ceiling

More importantly, we believe that the language of the bill does not limit its application to claims less than the proposed $100,000 ceiling. Section 803 provides that the bill does not apply to a claim or a "group of related claims which are submitted at the time such claim is submitted" and which exceed $100,000 in value. Accordingly, the ceiling applies only to claims submitted simultaneously. One act or group of related acts resulting in the separate submission of numerous invoices, each of which totals less than $100,000, could result in the institution of numerous proceedings under this bill. Therefore, this legislation could be applied to a situation involving one allegedly fraudulent act or group of related acts resulting in millions of dollars of false claims. Thus, this legislation would reach far more than "small" claims. If this bill goes forward, it should be amended to provide that the ceiling be applied to any claim or group of related claims arising out of a single set of operative facts.

C. Excessive Penalties

Section 802 of the bill, as drafted, is vague and ambiguous and would permit the imposition of penalties unrelated to the amount of damages actually suffered by the government. Sections 802(a)(1) and (2) would permit the assessment of a substantial penalty for false claims or false statements where the government has suffered no loss whatsoever. Under such circumstances, the bill becomes punitive and, we believe, is inappropriate. Moreover, Section 802(a)(1)(C) appears to provide for a penalty of twice the amount "claimed" regardless of whether the claimed amount was paid and whether the government sustained any damages. Such a punitive provision, which could result in the imposition of massive penalties, cannot be justified in a proceeding with the minimal due process protection afforded under this bill. If the bill goes forward, these provisions providing for the assessment of substantial penalties even where the government has suffered no damages should be deleted.

V. SUBPOENA AUTHORITY

The provision of testimonial subpoena authority to agents investigating alleged violations of the bill is extraordinary, excessive and unnecessary. Neither the FBI nor other investigative agents have the right to compel individuals to give oral testimony, regardless of the severity of the alleged crime being investigated. Certainly, in a situation involving small procurement fraud cases, granting investigative agents intrusive authority to compel testimony is not warranted. Further, such authority clearly would be subject to abuse. Although the grant of subpoena authority is theoretically limited to investigations of alleged violations under this bill, investigative agents would be able to use this authority regardless of the nature of the investigation by alleging that they are investigating a potential violation of this bill. Thus, the government could use this process to avoid and undercut the grand jury process. This provision must be eliminated from the bill.

VI. SUMMARY

In conclusion, the Shipbuilders Council of America is fully supportive of the federal government's efforts to eradicate procurement fraud. However, this bill would not further serve this purpose. It is duplicative of existing remedies available to the government and, as indicated by recent history, is not necessary to enable the government effectively to prosecute perpetrators of fraud, regardless of the size of the fraud. Instead, this bill would serve only to create further unnecessary adversity between the government and its suppliers. These factors, combined with the significant due process concerns raised by the bill, cause us to urge that this legislation not be enacted.

Attachment

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